Supreme Court of the United States

OCTOBER TERM, 1939.

No. 236.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (May 16, 1938) is reported at 23 Federal Supplement 411-420, and appears in the Record at pages 70-87. The opinion of the Circuit Court of Appeals (April 21, 1939) is reported at 103 Federal Reporter (2d) 450-453, and appears in the Record at pages 101-107.

GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Ch. 229, Sec. 1 (43 Stat. 938; 28 *U. S. C. A.*, Sec. 347).

The Circuit Court of Appeals, in affirming the judgment

of the District Court, has erroneously interpreted acts of Congress as denying the petitioner a right to sue on a postmaster's bond for breach of the postmaster's official and statutory duties toward petitioner.

Jurisdiction is sustained by this Court's decision in *Howard vs. United States*, 184 U. S. 676, holding that the Court had jurisdiction to review a decision of a Circuit Court of Appeals, concerning the scope and effect of a federal official's bond and the meaning of a federal statute under which it was given.

Wilkinson vs. Walker (C. C. A. 5), 3 Fed. (2d) 872, 874, was an action on a bond given in bankruptcy. Jurisdiction was upheld "because the laws of the United States authorize the taking of the bond," etc.

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, it was decided that for jurisdictional purposes, an action to enjoin a postmaster from misdelivering mail was one arising under the postal laws.

The surety's answer admitted jurisdiction (R. 31).

STATEMENT OF THE CASE

Explanatory Note.

To promote conciseness and clarity in this brief, we refer to Midland Loan Finance Company, the use plaintiff and petitioner, as "plaintiff"; to the defendants-respondents, collectively, as "defendants"; to defendant-respondent National Surety Corporation, as the "surety"; and to defendant-respondent Malone, as the "postmaster." (Although Malone was acting postmaster, all the parties concede that the case is to be disposed of the same as if he had been postmaster.)

Nature of the Case.

This is an action on a postmaster's bond to recover for loss sustained by plaintiff through the postmaster's tortious diversion of numerous business letters, etc., sent through the mails by plaintiff from Minneapolis, Minn., to various addressees at Montgomery, Minn., where defendant Malone was postmaster.

Ultimate Questions Presented.

The postmaster's bond was conditioned, as required by 39 U. S. C., A., Sec. 34, for "faithful discharge of all duties and trusts imposed on him * * * either by law or by the rules and regulations of the Post Office Department."

1. Does the bond benefit private users of the mail who are aggrieved by the postmaster's misdelivery of important business letters in violation of duties imposed upon him by acts of Congress and by regulations of the Department, or is the coverage of the bond limited to such losses as the Government itself may sustain through the postmaster's breach of duty?

2. If the bond does benefit private mail users, has Congress manifested intent that they shall have a right to sue on the bond in the name of the United States for their own use, without first securing consent of an administrative officer of the Government?

No question rises concerning a postmaster's liability for wrongs committed by his subordinates without his participation. The defendant postmaster's personal culpability is established by the verdict and the trial judge's ruling on the surety's motion to dismiss (R. 72-74).

The case does not involve any question as to priorities

between the Government and a private mail-user, if the bond sued on be deemed to benefit both. Nor does it involve any question concerning recovery rights, as between two or more beneficiaries, where two or more claims are made against a single bond for amounts aggregating more than the penal sum of the bond. There is no contention in this case that the Government or any one other than plaintiff asserts any claim against the bond, or that potential claims against it exist. The bond was supplanted by a new one given when defendant Malone was elevated from acting postmaster to postmaster (R. 84). Plaintiff's claim and rights arise under the superseded bond only.

Statement of the Facts.

The trial judge's order dismissing the complaint, after verdict in favor of plaintiff, contains a statement of the essential facts (R. 70-72). The following summary made from that statement will afford a sufficient approach to a consideration of the questions presented:

Plaintiff is engaged in automobile financing in Minneapolis (R. 70). Hunting was an automobile dealer at Montgomery, Minn., and defendant Malone was acting postmaster in that town (R. 71).

Hunting conceived and executed a scheme to defraud plaintiff, by selling to plaintiff ostensible conditional sales contracts and notes securing deferred payments, covering fictitious sales of cars. He forged the contracts and notes, and sold them to plaintiff as genuine paper (R. 71-72).

It was plaintiff's business practice to use the mails in investigating purchasers of cars, whose paper plaintiff was buying or had bought. Letters were mailed to credit references given in connection with the paper bought. Books in

which monthly payments made on the contracts were to be recorded were mailed to the persons required to make the payments, the purchasers of cars. Insurance certificates, receipts, etc., were also mailed to these persons (R. 71).

To guard against plaintiff's discovery of the fraudulent scheme, Hunting induced Postmaster Malone to turn over to him substantially all mail arriving at Montgomery in envelopes inscribed with plaintiff's return card. Hunting disposed of this mail in such manner as to dupe plaintiff for a long time. By making payments from time to time on the fictitious contracts, Hunting facilitated concealment of the fraud (R. 72).

As Judge Nordbye, the trial judge, stated, plaintiff "relied upon the integrity of the United States mails and honestly assumed that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed" (R. 72).

Concerning Malone's relationship to the fraud, the trial judge said:

> "By reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72).

No legal excuse for diverting plaintiff's mail into Hunting's hands has been suggested by either of the defendants or by either of the courts below.

The opinion of the Circuit Court of Appeals recognizes that "the material facts are not in dispute," and sets forth a statement of the facts substantially the same as that made by the trial judge, although omitting some details (R. 102-103; 193 Fed. (2d) 451).

Condition of Bond.

The bond given by Malone was in the sum of $16,000 and conditioned

> "That * * * Malone * * * faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System" (R. 19).

Bond Statutes Involved.

39 U. S. C. A., Sec. 34: "Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. * * * The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, and she shall be liable for misconduct in office as if she were sole." (The last sentence is here important only as it may throw light on the intended meaning of the phrase in the first sentence, "faithful discharge of all duties," etc.,

and, also, indicate that Congress had in mind the scope of a postmaster's *tort* liability when it fixed the coverage of his bond.)

5 *U. S. C. A.*, Sec. 377: "All bonds taken * * * by the Post Office Department shall be made to and with the United States of America."

39 *U. S. C. A.*, Sec. 815: "* * * Whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed by the Postmaster General."

Statutes Concerning Mail Delivery.

Sections of the federal statutes cited below deal with duties imposed upon postmasters for the benefit of mail-users, to insure delivery of letters to the addressees or return to the senders:

39 *U. S. C. A.*, Sec. 401, providing for advertising letters not delivered.

39 *U. S. C. A.*, Sec. 406: "The Postmaster General may regulate the period during which undelivered letters shall remain in any post office and when they shall be returned to the dead-letter office; and he may make regulations *for their return* from the dead-letter office *to the writers when they cannot be delivered to the parties* addressed. * * *" *Postal Laws and Regulations, 1932*, Sec. 826, requires that all matter reaching the dead-letter office "shall, as far as circumstances permit, be returned to senders, excepting such as is obviously of no value or is unmailable," etc. (Italics supplied.)

39 *U. S. C. A.*, Sec. 407, provides that all domestic letters on which postage has not been fully paid shall be sent to the dead-letter office, but Postal Laws and Regulations,

1932, Sec. 723, provides for giving the sender or addressee opportunity to pay the deficiency in postage before the letters go to the dead-letter office as unclaimed.

39 *U. S. C. A.*, Sec. 408, providing for sending to the dead-letter office domestic letters that cannot be delivered. "If the sender or addressee can not be identified, such letters shall be held for a period of one year awaiting reclamation."

39 *U. S. C. A.*, Sec. 409: "When the writer of any letter on which the postage is prepaid shall endorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter."

39 *U. S. C. A.*, Sec. 410, requiring letters to be forwarded to an addressee on his request and without additional postage.

18 *U. S. C. A.*, Sec. 315, making it a felony for one to take any letter out of a post office "before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another," or to embezzle a letter.

18 *U. S. C. A.*, Sec. 318: "Whoever, being a postmaster * * * shall unlawfully detain, delay * * * any letter * * * or shall secrete, embezzle, or destroy any such letter, * * * shall be fined not more than $500, or imprisoned not more than five years, or both."

18 *U. S. C. A.*, Sec. 324: "Whoever shall knowingly and willfully obstruct or retard the mail * * * shall be fined not more than $100, or imprisoned not more than six months, or both."

39 *U. S. C. A.*, Sec. 256, providing that not even nonmail-

able letters may be opened by "any person other than an employee of the dead-letter office."

Departmental Regulations Involved.

The following is a summary of various sections of the Postal Laws and Regulations, 1932, the first two of which appear in Title Five, Chapter 1, under the heading: "The Privacy and Safeguarding of the Mails":

Sec. 702, par. 1: "Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail matter." They may furnish proper information to the sender, addressee or post office inspectors, "but shall not withhold such mail from delivery to the addressees" (R. 11).

Sec. 703, par. 1: "Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants," etc. (R. 11).

Secs. 722-723: Regulate disposal of letters on which no or insufficient postage has been paid, in conformity to 39 *U. S. C. A.*, Sec. 407, *supra*. Require that addressees and senders be notified.

Sec. 724: Requires return to sender of misdirected letters.

Secs. 729-730: Matter withdrawable from mails only at instance of sender.

Secs. 769-772: Detailed provisions for forwarding mail to addressees.

Sec. 775, par. 1: "Ordinary mail matter addressed to fictitious persons, * * * unless directed to be delivered at a designated place, as a post office box, street and number, or to the care of a certain person * * * shall not be delivered and shall be sent to the Division of Dead Letters * * *

unless the envelope contains the card of the sender or a request to return, in which case such letters or packages shall be returned accordingly" (R. 12).

Sec. 777, par. 1: "Mail matter should be delivered to the person addressed or in accordance with his written order" (R. 12). This section contains numerous and detailed provisions concerning delivery of mail.

Secs. 804-805: Regulate return of letters to a sender whose return card appears on letters, in conformity to 39 *U. S. C. A.*, Sec. 409, *supra*.

The foregoing summary does not purport to cover all postal laws and regulations prescribing measures for the privacy and security of correspondence between sender and addressee. The summary merely attempts to illustrate the central policy of the Government to guard against intermeddling with private mail. All of the provisions embodied in Secs. 701-832, comprising Title Five of the Postal Laws and Regulations, 1932, will be found to be directed to that end.

Government's Attitude Toward Suit.

Defendants have presented an issue as to the right of the plaintiff to sue in the name of the United States without the consent of an administrative department of the Government. Plaintiff takes the position that Congress itself has conferred that right by implication necessarily rising from manifested intent that users of the mail, as well as the Government, should be protected by a postmaster's bond and rising from the absence of any statute forbidding suit in the form in which this action has been brought. The following undisputed facts bear on the attitude taken by the Department of Justice and the Post Office Department toward the case:

July 15, 1936, counsel for plaintiff wrote to the Attorney General a request for authorization to commence the suit (R. 59). The Department of Justice replied, September 22, 1936:

> "This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.
>
> "In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59).

Later a copy of an order (R. 27-30) overruling demurrers to the complaint was sent to the Solicitor of the Post Office (R. 59).

The Record discloses no attempt or disposition on the part of the Government to obstruct plaintiff in the prosecution of this action, excepting that as shown by the statement of the trial judge, a brief had been filed during the trial, by the United States Attorney for the local district as *amicus curiae*, in support of the surety's position that plaintiff had no right to sue (R. 53-54). A reference to that brief will show that the District Attorney did not question plaintiff's right to sue, if a beneficiary of the bond, but merely questioned that any liability is created by a postmaster's bond in favor of private mail-users.

The Government did not participate in any of the proceedings before the Circuit Court of Appeals.

Proceedings in the Case.

To plaintiff's complaint (R. 3-24), defendants demurred (R. 25-27). Judge Joyce of the District Court overruled the demurrers, holding, on the authority of *United States vs. Howard*, 184 U. S. 676, that the complaint showed plaintiff's right to sue on the bond in the name of the United States for the loss sustained by plaintiff (R. 29).

The surety answered (R. 30-32), denying tortious misdelivery of plaintiff's mail, admitting the court's jurisdiction, pleading that the bond was for the sole benefit of the United States, admitting the existence of duties imposed on the postmaster under the postal laws and regulations, and averring that the action was commenced without the consent or authority of the United States. The postmaster answered, denying breach of duty on his part, and causal connection (R. 32-34). Plaintiff's replies completed the issues (R. 34-35).

As shown by bill of exceptions, trial of the case resulted in a verdict for plaintiff against the defendants for $16,000, October 29, 1937 (R. 63).

November 16, 1937, the surety moved to dismiss the action on grounds principally directed against plaintiff's right as a beneficiary of, and right to sue on, the bond without the Government's consent (R. 63-65, 72-73). Despite an admission of jurisdiction made in the answer (R. 31), the surety also asserted lack of jurisdiction (R. 64). The next day, the postmaster made a similar motion (R. 65-66).

The District Court ordered dismissal of the action as to the surety on two grounds: (1) That the bond covered only

uch losses as might be sustained by the Government itself. 2) That the action was brought without the consent of the nited States (R. 67, 70-87; 23 Fed. Supp. 411). The Court ejected plaintiff's view: (1) That the statute requiring he bond, (39 U. S. C. A., Sec. 34) manifests an intention to enefit users of the mails as well as the Government. (2) hat, by legal intendment, flowing from such intention, mail- sers have a remedial right to sue on such bonds in the name f the United States.

The action was dismissed by the District Court, as to the ostmaster, on the sole ground that, because the surety had een dismissed from the action, diversity of citizenship was estroyed and the Court had no jurisdiction to proceed with he action between the remaining parties, both residents of Minnesota (R. 88).

The District Court's final judgment of dismissal was en- ered June 14, 1938 (R. 88).

August 18, 1938, plaintiff petitioned for leave to appeal o the Circuit Court of Appeals (R. 92-93). August 19, 938, the appeal was allowed (R. 91) and notice of the ap- eal was served August 23, 1938 (R. 90).

In the Circuit Court of Appeals, pursuant to an opinion led April 21, 1939 (R. 101; 103 Fed. (2d) 450), judgment as entered April 24, 1939, affirming the judgment of the District Court (R. 107-108). Petition for re-hearing (R. 09-113) was denied May 10, 1939 (R. 115).

Pursuant to petition, this Court granted a writ of certio- ari to the Circuit Court of Appeals, October 9, 1939 (84 . Ed. 73, 60 S. Ct. 102).

SPECIFICATION OF ASSIGNED ERRORS

Petitioner relies upon and intends to urge as ground for reversal of the judgment of the Circuit Court of Appeals each of the errors assigned in the petition for the writ of certiorari (pp. 16-18) and accordingly here assigns as error that the Circuit Court of Appeals erred in each of the following stated respects:

1. In holding that but a single question was presented to the Court, and that that question was whether a mail-sender could sue on a postmaster's bond, without the consent of the Government, for unauthorized delivery of the mail to one other than the addressee (R. 102; 103 Fed. (2d) 450). Petitioner contends that two questions were presented: (1) Whether mail-users are beneficiaries of a postmaster's bond? (2) If so, whether by legal intendment, the statute requiring the bond permits a mail-user to sue on such bond without any further consent of the Government?

2. In holding that it was not claimed that the defendant postmaster "had any knowledge of the fraud that was being perpetrated by Hunting"—the person to whom the mail was unauthorizedly delivered (R. 103; 103 Fed. (2d) 451). The Record shows that the trial judge merely observed that, although the testimony indicated that the postmaster knew of Hunting's business relations with plaintiff, it did not *directly* establish that Malone was knowingly a party to the fraud (R. 724; the evidence does not negative a finding by the jury on competent *circumstantial* evidence that the postmaster did know of the fraud that was being perpetrated upon plaintiff.

3. In holding that regulations of the Post Office Department may be considered in determining whether or not 39

U. S. C. A., Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452).

4. In holding that no inference may be drawn from 39 *U. S. C. A.*, Sec. 34, and related statutes that Congress intended to extend the protection of the bond to private mail-users (R. 106; 103 Fed. (2d) 452).

5. In holding that the decisions of this Court and other authorities cited by plaintiff "fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute" (R. 106; 103 Fed. (2d) 452).

6. In refusing to hold that, even if the "primary" or "dominant" purpose of 39 *U. S. C. A.*, Sec. 34, in requiring bonds of postmasters be deemed to be the protection of the Government in its fiscal and other relations with the postmasters, plaintiff is nevertheless entitled to recover as a "secondary" beneficiary of the bond, because the Government has no actual or potential claim against the bond (R. 113).

7. In affirming the judgment of the District Court (R. 107-108); such judgment not being supported by the law or the evidence and being contrary thereto.

8. In deciding that plaintiff is not entitled to recover, such decision being contrary to the law and the evidence.

9. In holding that the Court's conclusions were not inconsistent with those decisions in which the Government in actions brought by it upon similar bonds has recovered for theft of letters and the like, irrespective of the Government's liability to the mail-user (R. 106-107; 103 Fed. (2d) 452-453).

SUMMARY OF ARGUMENT

Below we summarize the points hereinafter argued, in the order presented in the argument. The points summarized and the points argued are correspondingly numbered.

I. The Circuit Court of Appeals erroneously confused a question of *substantive* right with a question of *remedial* right, and inaccurately summarized the issues presented.

II. *Howard vs. United States*, 184 U. S. 676, establishes jurisdiction and plaintiff's substantive and remedial rights under the bond—all the principal issues here involved.

III. The Letter of the bond statute confers benefits upon mail-users, as well as upon the Government.

III (a). The surety seeks judicial legislation.

III (b). That the United States was the sole obligee named in the bond is not a controlling factor.

III (c). The statute permits a bond normally sufficient to cover both the Government and mail-users.

III (d). Even if the bond was for the primary benefit of the Government, to secure an accounting, etc., by the postmaster, that does not exclude plaintiff as a secondary beneficiary.

III (e). Departmental regulations do not restrict bond coverage.

IV. The bond coverage is as broad as the postmaster's liability in tort to mail-users.

IV (a). The Record shows that defendant postmaster rendered himself liable in tort to plaintiff.

V. That postmasters are liable for wrongs against mail-users is an old and well-established doctrine.

VI. The degree of the postmaster's culpability is unimportant.

VII. The Spirit, as well as the Letter, of the statute requires that a postmaster's bond be deemed to cover mail-users' losses, as well as losses of the Government.

VII (a). The spirit of the law is found in the consideration that Congress has enacted what it should have enacted for the benefit of mail-users.

VII (b). The spirit of the law is found in the purpose for which the postal service primarily exists—the convenience and needs of the people in their private affairs.

VII (c). A postmaster's principal duties run to users of the mails, not to the Government.

VIII. The decision of the Circuit Court of Appeals conflicts with a settled rule that the Government, as a bailee, can recover on similar bonds for theft of registered letters and the like, irrespective of the Government's liability to the mail-user.

IX. Plaintiff's right to sue in the name of the United States flows from Congressional will or intent that mail-users shall be beneficiaries of the bond, and from omission of Congress to prescribe another and exclusive remedy.

IX (a). Congress has prescribed no special or exclusive remedy, for the benefit of mail-users, on a postmaster's bond.

IX (b). No departmental regulation purports to, or could, prescribe an exclusive remedy on a postmaster's bond.

X. The Attorney General's refusal to approve the bringing of this suit does not defeat the right to sue, because, as he ruled, the Government had no involved interest.

XI. The case falls within the general rule that the beneficiary of a contract has a right to sue to enforce payment of the benefit.

ARGUMENT

I.

The Circuit Court of Appeals Erroneously Confused a Question of Substantive Right with a Question of Remedial Right, and Inaccurately Summarized the Issues Presented.

(See Assignment of Error No. 1.)

In addition to issues litigated at the trial, as to the postmaster having violated his official duties to plaintiff and as to causal connection between such violation and plaintiff's loss—both of which issues have been settled in plaintiff's favor—the surety raised two distinct questions, which originated in its answer: (1) Whether or not the "bond was for the use, benefit, and protection of the United States of America only" (R. 31). (2) Whether or not the action was commenced without requisite consent or authority conferred by the Government (R. 32).

Howard vs. United States, 184 U. S. 676, presents a logical formula for determining the merits of any question as to whether or not a private person has a right to sue on a federal official's bond, conditioned for the faithful performance of the official's duties, where there is no statute that explicitly answers the question. That formula is: First, determine the substantive question, whether or not Congress intended that private persons should be protected by the bond. If Congress did so intend, the right to sue in the name of the United States follows as a matter of necessary implication, and no further consent of the Government is required,

unless there is a statute prescribing a restricted remedy. Had the Circuit Court of Appeals followed this formula it would have stated, in effect, that two questions were presented: (1) Is a private sender of mail through the United States mail a beneficiary of a bond given by a postmaster for the faithful performance of *all* the duties and trusts imposed on him by law or departmental regulations, in view of existing federal statutes and regulations which impose duties on postmasters, concerning the delivery of mail, for the sole benefit of mail-users? (2) If so, is there any statute forbidding the bringing of an action in the form in which this action was brought?

Despite this logical separation of the two questions in accordance with the pattern afforded by the *Howard Case, supra*, defendants and the Circuit Court of Appeals have lost sight of the importance of first determining whether or not plaintiff has any substantive rights under the bond, dissociated from the question of remedy. If that question should be answered in the negative, it is not perceivable how the surety could be held liable, no matter who should bring suit. On the other hand, if the bond should be held to be for the substantive benefit of plaintiff, the second question would merely involve determination as to what remedy or alternative remedies are provided by the Congressional will or intention.

In *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, in an opinion by Judge Learned Hand, the Court followed the pattern of the *Howard Case*, by dissociating substantive and remedial rights. That action involved the right of private persons to share with the Government the protection of a bond taken by the United States in its own name.

We respectfully submit that, in the light of the above-

mentioned considerations, the Circuit Court of Appeals erred in deciding:

> "On this appeal a *single question of law* is presented. It is: May a private sender of mail through the United States mails maintain an action, *without the consent of the government*, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee *without the written consent of the sender?*" (Italics supplied.) (R. 102; 103 Fed. (2d) 450.)

In assuming that this action has been brought "without the consent of the government," the Circuit Court of Appeals ignores the distinct issue as to whether or not Congress has manifested intent that suits on postmaster's bonds may be brought in the form in which this one was brought.

As to the premise that in this case mail was delivered to one other than the addressee, "without the written consent of the sender," that does not adequately represent the basic fact situation respecting the postmaster's culpability. Defendants do not claim that plaintiff consented in any form to the delivery.

The *basic* question is not whether a mail-user can "maintain an action" on a postmaster's bond, but whether the condition of the bond that the postmaster shall faithfully discharge *all* of his duties covers numerous duties to mail-users.

Although, as applied to this case, the question deals only with the wrongful delivery of mail to strangers, to the prejudice of the sender, the ultimate decision in the case will necessarily fix the rights of addressees, as well as senders, of mail. What is more important the decision will determine whether or not a postmaster's bond covers any sort of official misconduct that causes loss to senders or addressees of mail. If the bond does not cover the case at bar, then it could not

cover a case where a postmaster deliberately embezzles or destroys a letter, although that act would be a crime (18 *U. S. C. A.*, Sec. 318). Nor would the bond, under such interpretation, cover a case where a postmaster conspires with a third person to aid the latter in unlawfully securing from the post office letters passing between other persons, for the purpose of obstructing the correspondence or of prying into the secrets of the correspondents—although that would render the third party guilty of a felony (18 *U. S. C. A.*, Sec. 315) and unquestionably would also render the postmaster equally guilty as a conspirator (18 *U. S. C. A.*, Sec. 88, and authorities cited thereunder in note 156).

So, the vital question presented is not whether a postmaster's bond covers any *particular* breach of duty toward mail-users, such as is here involved, but whether the bond covers any breach of duty toward mail-users, where damage flows as a proximate result, regardless of differing degrees of culpability in different cases.

It will be noted that, in the last analysis, the Court does not dispose of the case upon a view that the particular character of a breach of duty by a postmaster determines whether or not a mail-user is a beneficiary of the bond. Despite the reference in the opening paragraph of the opinion to the particular breach of duty committed by the postmaster, the opinion clearly shows that it rests upon a conception that Congress did not intend that any mail-user should be directly benefited by a postmaster's bond, no matter what the degree of the postmaster's culpability may be (R. 106; 103 Fed. (2d) 452).

As to confusion of substantive and remedial rights, we believe that the opinion, as a whole, including the conclusions reached by the Court, shows a confusion of beneficial interest under a bond with capacity to sue to enforce the

interest. In this connection, we specially refer to the last paragraph of the opinion, where it is intimated that plaintiff might have such *indirect* beneficial interest in the bond that the Government could have sued on the bond on plaintiff's behalf (R. 106-107; 103 Fed. (2d) 452-453).

If the bond was not intended by Congress to secure the performance of a postmaster's duties to mail-users, as distinguished from his duties to make fiscal accounting to the Government, etc., how could the surety be held liable in any suit, regardless of by whom brought? But, if Congress intended that mail-users should be benefited by the bond—whether on equal terms with the Government or in subordination to protection of the Government—the opinion of the Circuit Court of Appeals fails to reconcile its decision, that plaintiff has no right to maintain this action, with the decision in *Howard vs. United States*, 184 U. S. 676, that where Congress has manifested intention that private persons be benefited by an official's bond, they have a right to sue for their own benefit, in the name of the United States, unless there is a statute providing another and exclusive remedy.

The foregoing observations are intended merely to serve as an approach to the discussion of specific phases of the case that follows.

II.

Howard vs. United States, 184 U. S. 676, Establishes Jurisdiction and Plaintiff's Substantive and Remedial Rights Under the Bond—All of the Principal Issues Here Involved.

(See Assignments of Error Nos. 1, 5, 6-9.)

Assuming that this Court will find no reason for receding from its decision in *Howard vs. United States*, 184 U. S. 676, we believe that this case, in its last analysis, turns upon a single question: Does a postmaster stand in a relationship

toward private mail-users that is akin to the relationship of clerks of the District Courts towards private suitors? If that question be answered in the affirmative, we respectfully submit that our right to recover is conclusively established by the *Howard Case*.

As will be seen hereinafter, the *Howard Case* involved a statutory bond worded essentially the same as the bond here sued on, running to the same obligee, the United States of America. The Circuit Court of Appeals thus interpreted and summarized this Court's holding in the *Howard Case*:

> "The court found that in view of the fact that the great mass of litigation in the federal courts was between individuals, Congress must have intended that a Clerk's bond should be for the protection of both public and private suitors, and it held that consent to sue in the name of the obligee, the United States, might be assumed to arise by legal intendment" (R. 105-106; 103 Fed. (2d) 452).

From what the Circuit Court of Appeals then proceeded to say, it is clear that the Court recognized that a strong analogy exists between the two cases:

> "We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute confers benefits upon users of the mails as well as upon the government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit; and that the situation is similar to that in the Howard case in that the principal purpose of the postal system is to transmit private mail. We are of the opinion, however, that *these considerations are outweighed* by the fact that the United States has *sufficient* interest in the integrity of its fiscal and other relations with numerous postal employees over the country to *indicate* that the statute requires a bond *primarily* for the gov-

ernment's protection. It is reasonable to *presume* that Congress intended *primarily* to protect that interest in enacting the statute requiring postmasters to give bond. *The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users*" (R. 106; 103 Fed. (2d) 452). (Italics supplied.)

Thus, the Circuit Court of Appeals seems to recognize a perfect analogy in the facts of the two cases: (1) In the identity of the obligee, the United States of America. (2) In the *letter* of the bond, and of the statute under which the bond is given. (3) In the administration of an agency principally designed for the benefit of members of the public in their private capacities. (4) In the existence of duties imposed by statute and regulations for the benefit of private persons, as well as for the Government.

But the Court of Appeals holds that "these considerations are outweighed" by the following counter considerations: (1) The Government's interest in its fiscal and other relations with postal employees is such as to *indicate* that a postmaster's bond is required *primarily* for the Government's protection. (2) A *presumption* that Congress intended *primarily* to protect the Government's interest rises from a consideration of the postal statutes and regulations. (3) No presumption may be drawn from the postal laws and regulations that "Congress intended to extend the protection of the bond to private mail-users."

Thus, in effect, the Circuit Court of Appeals virtually concedes that the *letter* of a postmaster's bond would protect private mail-users, if a supposed *spirit* of the statute under which the bond is given did not derogate from the letter.

In passing, we first draw attention to the fact that the Circuit Court of Appeals speaks of the bond as being for the "primary" benefit of the Government. Later on in the opinion, the Court speaks of a "dominant" purpose, but we assume that the Court meant "sole" benefit, in view of the conclusion that Congress did not intend to extend any benefit to private mail-users.

We respectfully submit that a holding that the bond is for the *primary* or *dominant* protection of the Government would not exclude plaintiff from recovering, because even as a *secondary* beneficiary, plaintiff would be entitled to recover. As shown in our statement of the facts, the Government makes no claim on the bond, which has been superseded by a new one, and there is no claimant against the bond, present or potential, other than the plaintiff. So, this Court is not called upon to determine any question of priority that might rise in another suit where a postmaster's bond becomes insufficient to satisfy a private claim or claims and also a claim by the Government. Such questions might be left as completely open for future decision when and if they rise as kindred questions are left open by the Court's decision in the *Howard Case*.

Detailed Resemblances Between the Howard Case and This Case.

Hereinafter, we make detailed references to the opinion in the *Howard Case* to refute positions taken by the defendants, and particularly by the surety. But, so that the Court better may sense the striking factual resemblances between the two cases, we here present the following outline:

Howard Case	Case at Bar
Condition of Clerk's Bond:	*Condition of Postmaster's Bond:*
"* * * *faithfully* to *discharge the duties of his office* and seasonably to record the decrees, judgments and determinations of the court of which he is clerk." (102 Fed. 78, 80, 184 U. S. 681-682.)	"* * * *faithfully discharge all duties and trusts imposed upon him as acting postmaster* either by law or regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government, * * * and shall also perform all duties and obligations imposed upon him * * * in connection with the Postal Savings System" (R. 19).
Obligee	
United States (184 U. S. 682; 102 Fed. 77).	United States of America (R. 19; 5 *U. S. C. A.*, Sec. 377).
Penal Sum of Bond	
$20,000 (184 U. S. 677).	$16,000 (R. 19).
Maximum Penalty Permitted	
$40,000 (184 U. S. 682).	No limit; "in such penalty as the Postmaster General shall deem sufficient" (39 *U. S. C. A.*, Sec. 34).

Who Was Plaintiff?

The United States, at the relation and to the use of David D. Stewart (93 Fed. 720).	United States of America, for the use and benefit of Midland Loan Finance Company, a corporation (R. 3).

Attitude of Government Toward Suit

No showing as to consent or nonconsent to maintenance in name of United States. Act requiring bond held to imply authority in relator to use name of United States (184 U. S. 690-694; 102 Fed. 84-85; 93 Fed. 721).	Attorney General recognized that the use plaintiff should sue in own right; that the Government could take no official action (R. 58-59). This was in response to request to use the name of the United States (R. 58-60). The right to sue is supported by the same implied statutory authority recognized in the *Howard Case*.

Nature of Official Duties Compared

Clerk dealt with both private and public litigants, and was also bound to account to the Government for money or other property in his possession belonging to the Government.	Postmaster dealt with both private and public mail-users, and was also bound to account to the Government for money or other property in his possession belonging to the Government.
Clerk under statutory duties to litigants, private and public, and, also, to Government in fiscal matters, etc.	Postmaster under statutory duties to mail-users, public and private, and, also, to Government in fiscal matters, etc.

To relax the rules laid down in *Howard vs. United States*, 184 U. S. 676, would be to disturb the foundation on which rest many cases that have been decided on the strength of that authority. (See *Rose's Notes and Shepard's United States Citations.*)

State vs. Dahl, 150 Wis. 479, upholding both the substantive and remedial rights of private persons on official bonds, is a notable example of the influence the *Howard Case* has had upon decisions throughout the country.

III.

The LETTER of the Bond Statute Confers Benefits Upon Users of the Mails, as Well as Upon the Government.

(See Assignments of Error Nos. 4-9.)

39 U. S. C. A., Sec. 34, reads:

> "Every postmaster * * * shall give bond * * * in such penalty as the Postmaster General shall deem sufficient, conditioned for the *faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department.*" * * * (Italics supplied.)

In our Statement of the Case, under the heads of "Statutes Concerning Mail Delivery," and "Departmental Regulations Involved" (pp. 7-10), we have abstracted the provisions of numerous statutes and regulations which clearly impose "duties and trusts" on the postmaster, for the benefit of mail-users. There is no escape from the thought that when a postmaster violates any of those duties he *literally* fails faithfully to discharge an official duty or trust imposed by both law and department regulations.

"The liability on the bond being controlled by the

statutory condition for faithful performance of duty, the issues in the suit on the bond are the existence and extent of the duty and whether the duty has been breached."

Title Guaranty & Surety Co. vs. State of Missouri (C. C. A. 8), 105 Fed. (2d) 496, 525.

From *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 402, an action on a county auditor's bond:

"* * * We are not confronted with any limitations written in the condition of the bond, which is simply that the defendant 'shall faithfully discharge the duties of his said office * * *' *under which we are to look only to the statutes of Ohio declaring and defining his duties, in order to determine what they may be.*" (Italics supplied.)

In *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, affirmed, 184 U. S. 676—to which reference has already been made—the Court gave effect to the letter of a federal court clerk's bond. It refused to read into the bond an intendment for the sole benefit of the Government, saying:

"If the statute was made to express the construction contended for, the condition would read, 'faithfully to discharge the duties of his office so far forth as they concern the United States only, * * *.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond."

In *United States vs. Ward* (C. C. A. 8), 257 Fed. 372, 378, the Court followed the *Howard Case, supra,* in holding that the bond of a referee in bankruptcy, conditioned for faithful performance of his duties, covered an illegal exaction and retention of fees by him.

Grady vs. United States (C. C. A. 8), 98 Fed. 238, was a suit on a postmaster's bond for embezzlement of money-order funds. The sureties argued that the bond did not cover the embezzlement, because the statute under which the bond was given also required that the bond be conditioned "for the faithful performance of all duties and obligations in connection with the money-order business." That specific condition was not included in the bond given. The Court held that that condition was embraced within the broad condition that the postmaster discharge "all duties and trusts imposed on him either by law or the rules and regulations of the department." The language of the opinion intimates an interpretation of bonds worded as the one at bar is worded, in line with the thought that an obligation for discharge of *all* of a postmaster's duties fixed by law, rule or regulation, covers *every* duty imposed on him by all of the rules and regulations prescribing what he shall do and what he shall not do.

A public officer's obligation faithfully to discharge his duty is an obligation to discharge all of his duties.

Quimby vs. Adams, 11 Me. 332, 334.

That benefits of a postmaster's bond are to be deemed to include users of the mails, as well as the Government, if the statute under which the bond is given does not *negative* the benefit is a proposition that finds support in *United States vs. Atlantic Coast Line R. Co.* (C. C. A. 4), 215 Fed. 56, 59. The court there said, with its own italicized emphasis:

> "The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of liability extending that far.*"

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, the Court dealt with a letter carrier's bond, the conditions of which bore a striking resemblance to the conditions of the bond in the case at bar. The liability on the bond was held to have been enlarged, not only by regulations existing when the bond was given, but by subsequently adopted regulations. And it was held that the Government was entitled to recover for loss sustained by a user of the mails, *even though the Government itself sustained no loss.*

A bond that makes no exceptions when it binds an official to the faithful discharge of all of his duties may enlarge, rather than restrict, the official's liability.

> "There is an established difference between a duty created merely by law and one to which there is added the obligation of an express undertaking."
>
> *Boyden vs. United States*, 13 Wall. 17.

In *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407, the Court held that a county auditor's bond, for faithful performance of his duties was not only for the benefit of the county and its inhabitants, but, also, protected the whole world against injury from his official misconduct. The Court rejected a contention that the bond was not intended to benefit outsiders, saying:

> "As before remarked, if such a construction were put upon these words, it would show that the legislature of Ohio did not pay that attention to the protection of the public which manifestly they have by such broad and comprehensive language as they used in this official bond, and not adopting those restrictive words which are found in too many of them."

From *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, 291; affirmed, *Bryan vs. United States* (C. C. A. 9), 90 Fed. 473:

> "The liability of a public officer upon his official bond is governed, to a large extent, by the terms of the bond itself, and the duties imposed upon him by law. *The terms of the bond sued on in this case are absolute. No exceptions are provided for.* The condition of the obligation was that he should faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the post-office department, etc." (Italics supplied.)

In a well-considered case *United States vs. Rogde* (D. C., S. D.), 214 Fed. 283 it was decided that a postmaster was not liable on his bond for loss or theft of a registered package *unless the loss or theft could be traced to his personal negligence, wrong-doing or disregard of postal regulations.* But the opinion clearly intimates the soundness of the converse proposition that a postmaster is liable for a mail user's loss that is attributable to his personal wrongdoing.

Excluding any distinction between mishandling of registered and mishandling of unregistered mail, the Court said:

> "This case, therefore, depends upon the answer to the one question of whether or not this defendant Rogde, as postmaster, *under the provisions of his bond, the laws of the United States, and the regulations of the Post Office Department*, became an absolute insurer of all mail matter that came into his hands, whether registered or ordinary mail matter, because it is conceded that there is *no difference in the liability of the postmaster as to the different classes of mail*, unless it be to the amount that the government is liable upon a registered package. * * *". (Italics supplied.)

If, as decided in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 598 (writ dismissed, 192 U. S. 601), the right to transmit mail and have it carried is a "positive legal right,"

and involves a corresponding *duty* of postal officials that is enforceable by mandamus, how can the language of the postmaster's bond statute, providing for security for the discharge of *all* of his *duties* be read as excluding duties to senders and addressees of mail?

That Congress has regarded as being of the highest importance the duties of postmasters in the matter of delivery of the mail is shown by the detailed provisions that are made by 39 *U. S. C. A.*, Secs. 401-411, to secure delivery of letters to the addressees or return to the senders. Had Congress deemed the subject of less importance it probably would have merely required the Postmaster General to make and enforce suitable regulations toward the desired end. But these statutes confer little or no discretion upon the Postmaster General and none upon postmasters.

Sec. 401 provides that the Postmaster General *may* direct that the list of nondelivered letters be published in a newspaper with the largest circulation in the particular post office's delivery area, etc. *Fosters vs. McKibben*, 14 Pa. St. (2 Harris) 168, 170, deals with the responsibility of postmasters under this statute. The Court decided that the postmaster was not answerable to a newspaper publisher for loss of compensation that would have accrued to the latter through the postmaster's publication of the lists, as required by the statute. However, the Court said:

> "But, though a postmaster is not answerable to a publisher *he would be answerable to a correspondent, whose letter had miscarried for want of publication, according to the terms of the statute, because a party actually injured stands on better ground than one who is not*, and for the same reason that such a party may have an action against the author of a public nuisance." (Italics supplied.)

Under *Postal Laws and Regulations, 1932*, Sec. 800, publication of lists of undelivered letters is not now required, but that does not detract from the general purpose of Congress and the Department that appropriate steps shall be taken to insure either delivery of mail to addressees or return to the sender.

Strong vs. Campbell, 11 Barb. (N. Y.) 135, closely resembles the Pennsylvania case last cited. The Court decided that the statute requiring publication of lists of undelivered letters was not for the benefit of publishers, saying:

> "The design of the law obviously was, first, to benefit persons, receiving communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon, which might otherwise never be called for, and consequently be returned to the dead letter office."

The defendant postmaster's delivery to Hunting of mail sent by plaintiff to other persons violated 39 *U. S. C. A.*, Sec. 409, which required that letters not deliverable to the addressees be returned to the sender, whose return card was endorsed on the envelopes. Even if there had been no return card on the envelopes, the delivery to Hunting would have been tortious, because 39 *U. S. C. A.*, Sec. 408, would have required that the letters "be held for * * * one year awaiting *reclamation*."

Hunting committed a felony by obstructing plaintiff's correspondence in violation of 18 *U. S. C. A.*, Sec. 317. Whether or not the postmaster became criminally responsible under this statute, as an aider and abettor, it is clear that he knowingly committed an act which enabled Hunting to com-

mit a crime and which at the same time violated statutory duties owing by the postmaster to plaintiff.

Under Sec. 317, a letter is embezzled by delivery to one other than the addressee unless he is the authorized agent of the addressee.

United States vs. Sander (C. C., N. D., Ohio), 6 McLean 598, Fed. Cas., No. 16,219.

The postmaster's delivery to Hunting of letters not addressed to him was a constructive, if not actual, *detention, delay or secretion* of the letters, within 18 *U. S. C. A.* 318, which makes it a felony for a postmaster to detain, delay or secrete letters.

The postmaster violated the spirit, if not the letter, of 18 *U. S. C. A.*, Sec. 318, which makes it an offense to "knowingly and willfully obstruct or retard the passage of the mail," etc. This statute protects the "transmission of mail from the time the same is deposited in a place designated by law or the rules of the Post Office Department up to the time the same is delivered to those *to whom it is addressed.*"

United States vs. Claypool (D. C., W. D., Mo.), 14 Fed. 127, 129.

Above we have discussed only such duties as are imposed on postmasters by statute, because Congress must be regarded specially to have had in mind the duties it had imposed for the benefit of mail-users, when it required a bond for the faithful discharge of *all* duties. But because the bond also comprehends duties imposed by departmental regulation, the following mentioned regulations (Postal Laws and Regulations, 1932) should not be overlooked:

Sec. 702, par. 1, forbidding postmasters to "give to unauthorized persons information concerning mail matter."

(Giving mail matter itself to unauthorized persons, of course, is the most culpable way that a postmaster could divulge information concerning it.)

Secs. 722, 723, so regulating handling of letters on which insufficient postage is paid as to insure delivery or return to the senders.

Sec. 775, par. 1, requiring that letters addressed to fictitious persons be returned to the sender, if his card appears on the envelope, or to the dead-letter office if there is no such card on the envelope.

Sec. 776, par. 6: A postmaster has no right to deliver a letter even to a post office inspector, without assuring himself as to the inspector's identity by inspecting his commission.

Sec. 777, par. 9: Not even husband or wife can control the delivery of matter addressed to the other.

A postmaster is not permitted to deliver a letter to a minor addressee's guardian over the ward's objection if the ward has reached the age of discretion.

13 *Op. Atty. Gen.* 481.

A postmaster has no right to deliver a letter to one other than the addressee, although commanded to do so by writ of attachment levied at the suit of creditors of the person to whom addressed.

12 *Op. Atty. Gen.* 136.

That a postmaster's bond covers all of his duties in the handling of mail, as well as his duty to account to the Government, was recognized in *Spinney vs. United States*, 32 Ct. Cl. 397, 399. In holding that a postmaster was not entitled to an award for aiding apprehension of an offender against the mails, the Court said:

> "*Postmasters are* not only *under obligation to care for and distribute the mails which come to their hands,* but are also under contract to care for and properly account to the Post Office Department for all public moneys and property which they receive in their official capacity. *For this purpose they are required to give bond,* and every consideration of public policy would seem to suggest that they should not claim rewards for doing those things which lead with greater certainty to the assurance that the *mails* and public money in their possession *are protected from depredation* and robbery." (Italics supplied.)

A technical defense "must not prevent us from seeing the vital elements in the case, which are the obligation of the employee to perform his duty honestly and faithfully, the surety company's bond covering this obligation by language of unmistakable meaning; and, finally, the undoubted breach of the employee's obligation and the condition of the bond." 23 *Op. Atty. Gen.* 476, 484.

In the last cited opinion, the Attorney General, Hon. Philander C. Knox, interpreted the coverage of a postal clerk's bond conditioned essentially the same as the bond at bar, and declared:

> "I am not able to accept the view of the case which * * * remits the sender of the letter to the fruitless right of suing a discredited and bankrupt thief on the chance of bringing hidden assets to light, and which dismisses the surety company, to whose contract the owner is not a party, after the statutory liability of the Government has been settled." (p. 483.)

As hereinafter pointed out, the importance of a postmaster's duties to private mail-users outweighs the importance

of his duties to the Government. But a well-reasoned decision of the Wisconsin Supreme Court shows that a bond for the faithful performance of *all* of an official's duties should be deemed for the benefit of a private class of persons falling within the language of the bond, no matter how small that class may be numerically.

In the Wisconsin case—*State vs. Dahl*, 150 Wis. 479—which followed the *Howard Case*, a state treasurer's bond was conditioned for the faithful discharge of his official duties and for the delivery to his successor or other person entitled of all papers, etc., belonging to the office. The receiver of a savings loan and trust company sued on the bond in the name of the state, on his own relation, to recover for failure to return securities that had been deposited by the company with the state. The Court said:

> "The duty to safely keep the securities in question is a duty whose faithful discharge is guaranteed by the bond just as fully as any other official duty. True it is a duty in which neither the state nor the general public has any direct interest; it is to be performed for the benefit of a class, and probably a very limited class, of people; but *it is none the less an official duty.*" (Italics supplied.)

Official bonds must be interpreted as if the statutory duties of officer were inserted therein and are in effect merely collateral security for performance of officer's duties.

State vs. Alabama Power Co., 230 Ala. 515.

State vs. Nevin, 19 Nev. 162.

There is no inequity in holding the postmaster and his surety to an interpretation of the bond that conforms to the wording of the obligation and of the statute under which it is given.

The postmaster and his sureties are chargeable with notice as to the extent of duties and responsibilities imposed upon him by law or regulation.

Deal vs. United States (C. C. A. 9), 11 Fed. (2d) 3, 7, reversed on other grounds, 274 U. S. 277.

The *Deal Case* was an action on a postmaster's bond for loss of money from a registered package. The evidence tended to show that the package was rifled while in the postmaster's office. It was admitted that he had failed to observe certain regulations intended to secure safety of registered matter, but denied that this disregard of official duty caused the loss. This Court held that the trial judge should have instructed the jury that violation of the regulations would not sustain recovery on the bond unless the violation proximately caused loss. This holding rested upon an interpretation of certain postal regulations as fixing the personal liability of postmasters for post office robberies and depredations upon registered mail.

As we read the decision in the cited case, the verdict for plaintiff on the bond would have been upheld had it been returned under proper instructions and evidence justifying a finding that the postmaster's violation of departmental regulations was the proximate cause of the particular loss. In the case at bar, defendants have taken no steps to review the jury's findings—to which the trial judge refers (R. 72)—"that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict."

"* * * The instrument is required by a statute which defines its terms, and the law of the office is a

part of the contract. The surety guarantees the faithful discharge of all duties properly pertaining to the office, and the extent of such liability can be determined only from the bond and from the statutes creating the office and defining the terms of the bond. See *Lowe vs. City of Guthrie*, 4 Okl. 287, 44 P. 198."

Howard vs. United States (C. C. A. 7), 87 Fed. (2d) 243, 247.

In *United States vs. Barker* (C. C. A. 3), 100 Fed. 34, a postmaster was held liable on his bond for violating a regulation forbidding postmasters to afford access by unauthorized persons to blank money orders. His assistant, for whose act he was found to be liable, delivered such blanks to an impostor who posed as a post office inspector. The blanks were used in forging money orders which were paid by post offices in other towns. The Court said:

"This regulation prescribes one of the duties of a postmaster for the performance of which he gives bond. The duty thereby imposed is an absolute one, and its breach undoubtedly would constitute a forfeiture of the obligation of the bond."

As to culpability, the case at bar is much stronger than the cited case, because there the money order blanks were innocently delivered to a person believed by the postmaster to have a right to receive them, whereas, here the postmaster knew that plaintiff's mail was being delivered to a person not entitled to receive it.

The regulation involved in the last cited case, in addition to prescribing a duty, specified that the postmaster would be held responsible for any loss suffered by the Department through disregard of the regulation. But the opinion shows, as above quoted, that the Court rested its decision, not upon

that provision, but upon the part of the regulation that prescribed the postmaster's *duty*.

In a Canadian case, a postmaster gave bond to secure against his misfeasance. He opened a letter, abstracted checks therefrom, forged the payee's endorsements, and guaranteed the checks. A losing bank sued on the bond, but the Court held the bond did not cover the loss. The loss was not proximately caused by larceny of the checks but by the forgery of the endorsements and the making of the guaranty. The Court further noted that the letter and its contents did not belong to the bank.

Postmaster vs. McColl, 31 U. C. C. P. R. 364.

The implications of the last cited case are that the sender or addressee of the letter could have recovered on the bond.

From *Thunder Hawk School Dist. No. 8 vs. Western Surety Co.*, 58 S. D. 312:

> "The official bond of the township treasurer is required to be conditioned 'for the faithful performance of his duties as such treasurer.' *Language more inclusive could hardly be used.*" (Italics supplied.)

The language of the bond at bar is even more explicit, for it requires a bond for faithful discharge of "all" of the postmaster's duties.

An unconditional bond for performance of official duties, such as the one at bar, should be regarded as being mainly directed to the providing of *security* for the performance of those duties. Obviously, the principal purpose is to guard against the official's insolvency and the consequent inability of those whom he has aggrieved to enforce their claims against his property.

An official bond *insures* the performance of official duty.

Berau's vs. United States, 13 Wall. 56.

We concede that Congress *could* enact a statute that would limit coverage of a postmaster's bond to losses of the Government, and thereby leave mail-users remediless, excepting as the postmaster may be solvent. But we assert that Congress should not be deemed to have adopted a policy that exposes mail-users to a risk of losses at the hands of postmasters that the Government is unwilling to take itself, unless that policy be explicitly declared. The declaration certainly does not exist in statutory wording that favors mail-users as much as it does the Government. In passing, it is to be noted that it costs the Government no more to protect both itself and mail-users than to protect itself alone, because the Government pays no part of the premiums on such bonds. (6 *U. S. C. A.*, Sec. 14.)

While it is true that a clearly worded bond statute may limit coverage to less than all of the official's duties, it is not to be overlooked that the statute and bond may be so worded as to enlarge liability existing apart from it.

In *Boyden vs. United States*, 13 Wall. 17, this Court noted that a receiver of public monies, as bailee, probably would not be liable for loss not caused by his fault. But the Court added:

> "He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which there is added the obligation of an express undertaking."

The last cited case was followed in *Smythe vs. United States*, 188 U. S. 156, 167.

See, also, *United States vs. Fordyce* (D. C., W. D., Ky.), 122 Fed. 962, where a postmaster's bond was held to cover

losses of stamps and money order funds, although he was not personally at fault.

To the same effect, see *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, affirmed (C. C. A. 9), 90 Fed. 473.

If a postmaster's bond be deemed to cover losses for which he is not personally at fault, because the letter of the bond covers the losses, there are stronger reasons for imposing liability on the bond where, as here, the loss is not only within the letter of the bond but was, also, caused by the postmaster's own deliberate fault.

III (a).

The Surety Seeks Judicial Legislation.

To give effect to the surety's contentions must involve an *amendment* of the statute, and not an interpretation. The surety would change the statute by adding to it the wording italicized below, or its equivalent:

> "Every postmaster * * * shall give bond * * * for the faithful discharge of all duties and trusts imposed on him, * * * *for the benefit of the Government.*"

The alternative would be to add to Sec. 34:

> "Provided, that the bond herein provided for shall be deemed to be for the sole benefit of the Government."

From *Sweet vs. United States* (C. C. A. 8), 228 Fed. 421, 423:

> "The United States now asks the courts to amend section 6 by adding thereto the words 'nor shall,'" etc. "But such an amendment * * * would be violative of settled canons of construction and established principles of law. * * * *The conclusive legal presump-*

tion is that the legislative body meant what it said, and the duty of the courts is to give effect to its acts, not to amend or repeal them." (Italics supplied.)

The postmaster's bond statute falls squarely within the rule that the letter of an unambiguous law is not to be disregarded on the pretext of pursuing its spirit.

Crooks vs. Harrelson, 282 U. S. 55.

From *Palmer vs. Massachusetts*, 83 L. Ed. 8, 10, decided at this term:

> "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism," etc.

We respectfully suggest that wariness is specially enjoined when, as here, an attempt is made, not only to impute to Congress an intention to restrict where the legislative phraseology permits no restriction, but also to impute to Congress an intention that the people themselves, in their individual capacities, shall be left remediless, in dealing with a governmental agency created principally for their private benefit, despite an act of Congress which, on its face, makes them co-beneficiaries with the Government in security for the performance of official duty.

There is no hardship in holding a surety to obligations falling within the plain and ordinary meaning of the words

in which its bond is couched, and of the statute pursuant to which the bond is given. But even if a hardship did result, the case would still fall within what this Court said in *Jos. Schlitz Brewing Co. vs. United States*, 181 U. S. 584, 589:

> "Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force."

From *St. Louis, I. M. & S. R. Co. vs. Taylor*, 210 U. S. 281, 295:

> "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. * * * It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body."

To the same effect are:

American Bank Protection Co. vs. City National Bank (D. C., E. D., Tenn.), 203 Fed. 715, 719.

Ladew vs. Tennessee Copper Co. (D. C., S. D., Tenn.), 179 Fed. 245, 252.

We adopt the language used by the surety at page 15 of its reply to the petition for certiorari, merely adding the word "not," to show the nature of recourse open to sureties if they deem themselves aggrieved by the postmaster's bond statute: "Of course, if there be any good reason why users of the

mail should" *not* "be permitted to sue on postmaster's bonds, those reasons should be addressed to * * * the Congress."

We reject the surety's suggestion that reasons for changing the law on this point might be addressed to the Postmaster General, as an alternative to addressing Congress, and the surety's intimation that the Postmaster General might "fix the conditions of future bonds to permit such suits." Here, again, the surety discloses its fundamental misconception that the Postmaster General can add to or subtract from rights fixed by Congress.

In *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, it was said, concerning classification of mail-matter:

> "There would seem to be some inequality with which Congress should deal; yet it is not the province of the Postmaster General to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law."

We borrow from *Meads vs. United States* (C. C. A. 6), 84 Fed. 684, 694, an action on a federal official's bond, the pertinent observation:

> "There is therefore no equitable feature in the position of the sureties by reason of which they should be favored by any nice or doubtful interpretation."

The suggestion made by the surety in this connection, that a postmaster is entitled to look "only to his departmental superiors" is answered by what was said in *Commerford vs. Thompson* (C. C., Ky.), 1 Fed. 417, 419:

> "The mails are, *prima facie*, intended for the service of every person desiring to use them; and a monopoly of this species of commerce is secured to the post office department. * * * It is, then, scarcely necessary to

> say that *the officers of the department are the agents of the public in the performance of this service*, and that no postmaster, whether acting under the instructions of the postmaster general or not, can lawfully refuse to deliver letters addressed to his office, unless special authority for so doing is found in some act of Congress. Indeed, the unlawful detention of letters by a postmaster is denounced by sections 3890 and 3891, and a violation of his duty to deliver mail is made punishable by fine and imprisonment." (Italics supplied.)

At page 15 of the surety's reply to our petition for certiorari it is contended that an interpretation of the statutes and bond here involved, as permitting mail-users to sue on postmaster's bonds, will produce a situation not "dreamed" of by the Post Office Department, or the Attorney General, or by the postmaster, or by the surety.

Although the surety here refers to the right of a mail-user to *sue*, the context indicates that, confusing substantive and remedial rights, the surety's argument at this point is directed against the substantive rights of mail-users as beneficiaries of postmasters' bonds.

As to the postmaster and the surety, they had no right to "dream" that their bond for the faithful discharge of *all* of the postmaster's duties included only a *part* of his duties. Both were bound to interpret their obligation in the light of the fact that the postmaster's principal duties were owing to mail-users, and not to the Post Office Department, excepting as the Department operates as an agency for mail-users.

As to remedies for breach of the bond, it is unimportant what may have been in the minds of the postmaster and the surety. They were bound to assume that some appropriate remedy would exist in favor of a mail user if he should be aggrieved by the postmaster's breach of official duty. They

ought to have contemplated that the injured party could sue, unless there was a statute to the contrary.

Howard vs. United States, 184 U. S. 676.

As to the Attorney General, he does not rule that mail-users are or are not beneficiaries of a postmaster's bond. He says:

> "Whether the sureties on a bond * * * are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General" (R. 59).

III (b).

That the United States Was the Sole Obligee Named in the Bond Is Not a Controlling Factor.

If the surety should pursue in this Court a contention made in the lower courts, it will rely on the fact that the obligee named in the bond here involved is the United States. But that contention is fully answered in *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, 80:

> "The United States is named as the obligee in the clerk's bond, as is done in the case of the marshal's bond *and the bonds of other officers of the United States;* but the bond is given for the indemnity of any one (the United States no more than any private suitor) who suffers loss by the breach of the condition of his bond 'faithfully to discharge the duties of his office.' This comprehensive condition embraces every duty and obligation imposed on him by law or the lawful order, usage, and practice of the court. *Grady vs. U. S.*, 39 C. C. A. 42, 98 Fed. 238." (Italics supplied.)

This Court, in upholding the Circuit Court of Appeals, overruled a contention "that, the bond in suit having been

given to the United States, it must be deemed an instrument for the sole benefit of the government," etc.

Howard vs. United States, 184 U. S. 676, 687.

The decision in the *Howard Case*, that a private beneficiary of a bond running to the United States could sue on it in the name of the United States could not have completely escaped attention in governmental circles. The fact that the decision has stood for nearly forty years without any substantial change in various acts of Congress dealing with official bonds creates a strong inference that both Congress and the administrative agencies of the Government have acquiesced in the rule so laid down by this Court.

In *State vs. Dahl*, 150 Wis. 479, which followed the *Howard Case*, the Court ruled that a state treasurer's bond was none the less for the benefit of private persons aggrieved by his breach of official duty because the State was named as obligee.

United States vs. Globe Indemnity Co. (C. C. A. 2), 26 Fed. (2d) 191, also followed the *Howard Case*. It was held that a bond to perform a contract for cartage of imported goods to appraisers' stores, was for the benefit of owners of the goods as well as of the Government, although it ran to the United States, and that the surety could not complain so long as it got a good discharge.

United States, to Use of Kinney, vs. Bell (C. C. A. 3), 135 Fed. 336, was an action on a Federal Circuit Court clerk's bond, conditioned for the faithful performance of the duties of his office. The Court said:

> "Although the bond of a clerk of the United States Circuit Court (as in this instance) is given to the United States as sole obligee, yet, no doubt, such bond is available to any private suitor to indemnify him for

> any loss he has sustained by reason of the failure of the clerk to discharge any of the duties of his office."

In the cited case the bond was alleged to have been broken through the clerk's refusal to issue summons in another action. Recovery was denied on the ground that the Court did not have jurisdiction of the other action in which it was sought to have summons issue.

See, also, *In re Walker Grain Co.* (C. C. A. 5), 3 Fed. (2d) 872, 874, where the Court said of a bond given in bankruptcy: "Although the bond is made payable to the United States, it is so made for the benefit of petitioning creditors."

In *State vs. Norwood*, 12 Md. 177, a private person sued on a court clerk's bond running to the State. The defendants objected that the equitable plaintiff could not maintain the action unless he could show that the State had authorized him to do so. The Court said:

> "The laws which provide for the execution of bonds similar to the one before us do not require them for the purpose of protecting the rights of the state alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and therefore they should have the privilege of suing such bonds for injuries sustained by them through the negligence or malconduct of the officers. Such doctrine in regard to public official bonds we consider as having been long established in Maryland, whatever may be the law elsewhere. And, entertaining these views, we cannot agree with the defendants' counsel in supposing the present equitable plaintiffs could not institute this suit; because they had not obtained authority from the state for that purpose" (p. 194).

The cited case is referred to, approvingly, in *Howard vs. United States*, 184 U. S. 676, 692-693.

In turn, the doctrine of the *Howard Case*, with the reference to the Maryland decision, was adopted in *City of Beckley vs. Moran* (C. C. A. 4), 61 Fed. (2d) 238, 241. In the latter case the bond of a chief of police was held to cover liability to one wrongfully arrested by him. The bond named the city as obligee and was conditioned that the officer "faithfully and impartially discharge the duties of his office, * * * and shall account for and pay over all money which may come into his hands by virtue of said appointment." It will be observed that the bond was of the same pattern as the one at bar (R. 19) in the respect that each bond first covered the officer's duties generally and then specifically covered fiscal duties.

The mere fact that mail-users are very numerous makes it natural that Congress should have designated the United States of America as the obligee of postmasters' bonds, without any intention either to restrict the beneficial coverage of the bond or to bar a remedy enforceable directly by private beneficiaries.

In *State vs. Gaver*, 115 Md. 250, the Court dealt with cases where bonds run to a State, in which the State has no interest—such as bonds on appeal and in guardianship and insolvency proceedings affecting private interests only. Referring to some earlier Maryland decisions, the Court said:

> "These cases hold that where a bond is required by law, and the statute does not specify to whom it shall be made payable, it may, *where many persons are interested*, be taken in the name of the state, and that suit may be brought on it by those for whose protection it is required, *without* obtaining the authority of the state for that purpose." (Italics supplied.)

District of Columbia vs. Fidelity & Deposit Co. (App. D. C.), 271 Fed. 383, was referred to by the Circuit Court of

Appeals in the case at bar as supporting a general rule that only the obligee of a bond can sue on it (R. 105; 103 Fed. (2d) 452). The action was brought to the use of a private person on a bond running to the District of Columbia. That the attention of the District Court of Appeals was not drawn to the *Howard Case* is to be inferred from the fact that the Court quotes from *Corporation of Washington vs. Young*, 10 Wheat. 406, 409, and then adds: "So far as we know, this has remained the view of that Court as to sealed instruments." Since the *Young Case* was discussed at length in the *Howard Case* and there distinguished (184 U. S. 690-692) it is inconceivable that the District Court of Appeals would have omitted a reference to the *Howard Case* had it known of the case, and it is not probable that the Court would have disregarded this Court's precise pronouncement that a private person may sue on a bond intended for his protection even though the United States of America is the only obligee named in the bond.

The District Court of Appeals said that "Congress has proceeded upon the same assumption"—as to the obligee being the only person who could sue. We doubt that the Court would have so declared had it known of the *Howard Case*, and noted that Congress constructively acquiesced in the holding in that case that a Federal Court clerk's bond may be sued on by a private person in the name of the United States, although the United States is the sole obligee. The statute under which Federal Court clerks' bonds are required (28 *U. S. C. A.*, Sec. 513) remains unchanged long after the *Howard Case* was decided.

In *Burkland vs. Bliss*, 62 S. D. 91, plaintiff sued on city police officers' bonds for false imprisonment. The bonds were conditioned for the faithful performance of official duty and "were made payable to the city." There was no statute

expressly conferring benefits of such bonds on third persons. The Court reviewed authorities holding sheriffs liable on similar bonds, and concluded:

> "The right of an individual to maintain an action on the bond of a peace officer given to a city is not distinguishable in principle from an action upon a bond of a sheriff wherein the county is named as obligee."

From *Hollister vs. Hubbard*, 11 S. D. 461:

> "While the statute requires that the sheriff's official bond shall be in form given to the county, as a matter of expediency, it is designed to protect the public, whose servant he is, and indemnify each person that may be injured by his default or misconduct in office. By becoming the nominal obligee, pursuant to statute, the county assumes no liability for costs, or other responsibility in connection with a suit of this character, and *no reason exists for requiring it to be made a party.*" (Italics supplied.)

This is in line with what the Attorney General wrote counsel for plaintiff in the case at bar, that plaintiff's claim was its own exclusive property and that the case was not within the Attorney General's control (R. 58-59).

From *Scott vs. Feilschmidt*, 191 Iowa 347:

> "One suffering damage at the hands of one required to give bond by reason of the breach of the bond may bring action on the bond regardless of who is named as obligee therein."

To the same effect, see:

City of Cairo vs. Sheehan, 173 Ill. App. 464.
People vs. Morgan, 188 Ill. App. 250.
Town of Lester vs. Trail, 85 W. Va. 386.
State vs. United States F. & G. Co., 85 W. Va. 720.

In the last cited case, the Court cites several decisions of the West Virginia Supreme Court of Appeals, all to the effect that a bond securing faithful performance of official duties is for private, as well as public benefit, although the obligee is the State or a municipality.

III (c).

The Statute Permits a Bond Normally Sufficient to Cover Both the Government and Mail-Users.

(See Assignments of Error Nos. 4-6.)

There is no limit on the penalty that may be fixed in a postmaster's bond. He must give bond "in such penalty as the Postmaster shall deem sufficient." (*39 U. S. C. A.*, Sec. 34.)

Defendant postmaster could have been required to give bond in the sum of $50,000, or even more, although a bond in a considerably smaller sum probably would be normally adequate reasonably to secure faithful discharge of his official duties to all interested in their performance.

Occasionally, as in the case at bar, the Post Office Department will take a bond that is insufficient to secure against loss caused by the postmaster's breach of duty. But that eventuality cannot diminish the effect of a statute that requires a bond for the performance of all duties.

The Government is always in a position to exact a new bond from a postmaster if a recovery on an existing bond diminishes security for the further performance of his duties. *Postal Laws and Regulations, 1932*, Sec. 414, provides: "Postmasters shall furnish new bonds whenever deemed necessary by the First Assistant Postmaster General."

Judge Nordbye, the trial judge, argues that, in this case,

the entire bond will be exhausted by plaintiff's claim and that "such a situation cannot be reconciled with the primary purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified" (R. 81). (Italics supplied.).

We respectfully submit that that argument finds a complete answer in *Howard vs. United States*, 184 U. S. 676. There a statute, which originally required a Federal Court clerk to give a bond in the flat sum of $2,000, conditioned for faithful discharge of his duties, etc., was so amended as merely to raise the penalty sum to a minimum of $5,000 and a maximum of $20,000, as determined by the Attorney General, with conditional authority given him to require a bond not exceeding $40,000. (See 102 Fed. 80 and 184 U. S. 681-682.) These changes in the statutes requiring a clerk's bond were not accompanied by any change in the *condition* of the bond; from the original enactment in 1789 on down through the years the condition remained the same—"faithfully to discharge the duties of his office," etc.

It necessarily follows from the decision in the *Howard Case* that the penal amount of a particular bond has no relation to its legal coverage, and does not determine the parties entitled to its benefits. This Court attached no importance to the adequacy of the bond potentially to protect all parties, including the Government and private parties, suffering losses. The decisive factor was the condition of the bond, read in the light of the clerk's relationship to private parties.

In the *Howard Case*, the bond of a clerk for so important a judicial district as one including Kansas City and surrounding territory was fixed at only $20,000, as against a $16,000 bond in the case at bar for a postmaster in so small a town as Montgomery, Minn. (1,570 population according

to 1930 census.) It so happened, in the *Howard Case*, that the clerk's misconduct involved only $2,525. But the decision clearly would have been the same if the amount had been $20,000, the full penalty of the bond.

The only reference made in the *Howard Case* to the amount of a bond being indicative of legislative intent as to who should be protected is the statement of this Court to the effect that authority in the Attorney General to require a bond not in excess of $40,000 implied intent to protect both public and private parties. (184 U. S. 687.).

If, as held in the *Howard Case*, power given the Attorney General to increase to, but not beyond $40,000 the penalty to be fixed in a clerk's bond, is indicative that the bond was intended to benefit both public and private parties, then for much stronger reasons does not the giving of unrestrained power to the Postmaster General in the matter of fixing the penalty in a bond bearing similar conditions indicate like intent?

Because plaintiff is the only claimant against the bond, any question as to whether plaintiff could have exhausted the bond to the prejudice of the Government, if the Government had had a claim on the bond, is a moot question. A final decision in this case can be safeguarded against its being treated as a precedent on that point.

A decision as to the liability of defendant Surety Company to plaintiff, a user of the mail, does not require any weighing of benefits of the bond as between the Government and users of the mail. The Government asserts no claim on the bond, and can have no future claim under it, because a new bond has been substituted (R. 84). How rights of the Government and plaintiff properly would have been reconciled or determined had the Government sustained a loss under

the bond and had the combined losses of the Government and plaintiff exceeded the penalty of the bond, is a question not here presented.

The essential question is whether the bond operates to the benefit of users of the mail, as well as the Government. That is the only question in which the surety has any legitimate interest. It has no standing to represent the Government's interests. Its solicitude for the financial welfare of the Government in a class of cases not here involved—where a bond may be insufficient to cover losses of both Government and post office patrons—is a mere avenue through which the surety seeks to escape from liability on the ground that the only party who claims injury through failure of the postmaster faithfully to discharge the duties of his office was not a beneficiary of the surety's guaranty.

The surety is not concerned with priority rights as between two or more beneficiaries of the bond, or whether one beneficiary exhausts the bond to the exclusion of a potential beneficiary. The surety is protected by the consideration that it is liable only for breaches of the bond, and not liable for more than the penalty of the bond.

> "Certainly, in the absence of a statute providing therefor, the surety cannot be made a trustee and the burden be imposed upon him of ascertaining who are all of the present or possible future claimants to share in the amount covered by the bond. However much the idea of prorating liability among the different claims might at first thought appeal to a court of equity, it can have no place in this action because the measure of liability of the sureties is the statute and the terms of the bonds, and the holder of a second judgment can have no equity against a surety who has paid in good faith an earlier judgment which exhausts the full penalty of the bond."
>
> *Southern Surety Co. vs. Bender*, 41 Ohio App. 541.

The solicitude of the surety for the Government's interest in a type of case not here presented—a supposed case where a bond is not sufficient to cover losses of the Government and losses of private parties—finds a close parallel in *United States vs. Abeel* (C. C. A. 5), 174 Fed. 12, 20, a suit on a Federal Court clerk's bond for the benefit of numerous private parties. In response to a claim that the Government could not recover because it did not name the persons for whose benefit the action was brought, the Court said:

> "To hold that this suit cannot proceed without naming them would be equivalent to saying that the clerk could appropriate the fund and hold it because of the fact that it is not possible, under the circumstances to name them all. *We would not willingly reach a conclusion leading to results so injurious to the public interests.*" (Italics supplied.)

III (d).

Even if the Bond Was for the PRIMARY Benefit of the Government, to Secure an Accounting, etc., by the Postmaster, That Does Not Exclude Plaintiff as a Secondary Beneficiary.

(See Assignment of Error No. 6.)

The Circuit Court of Appeals says that no inference may be drawn from related statutes and regulations "that Congress intended to extend the protection of the bond to private mail-users." But that Court somewhat diminishes the force of that holding by declaring that "it is reasonable to suppose that Congress intended *primarily* to protect" the interest of the Government, and by concluding that "the *dominant* purpose of Congress was to provide protection to the United States" (R. 106; 103 Fed. (2d) 452). (Italics supplied.)

In our petition for rehearing in the Circuit Court of Appeals, we drew attention to the point that a holding that a postmaster's bond is for the "primary" or "dominant" benefit of the Government does not necessarily exclude a secondary or subordinated benefit in favor of private mail-users, and that because the Government makes no claim on this bond, the bond should be enforceable for plaintiff's benefit, even if plaintiff be only a secondary beneficiary of the bond (R. 113).

As noted in the preceding subdivision of this brief, Judge Nordbye, the trial judge, spoke of "the *primary* purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified" (R. 81; 23 Fed. Supp. 417). (Italics supplied.) Judge Nordbye seems to recognize the existence of a secondary benefit in favor of mail-users, but holds that it is a benefit that must be enforced in a suit brought by the Government. He says, at the pages last cited:

> "However, the moral obligation of the Government to protect the patrons of the post office who may have suffered loss, whenever it may proceed against an available fund, is entirely consistent with the apparent purpose of the statutes in question. It is the Government that must institute the proceedings. *If a surplus remains after the Government has been made whole, the public has the right to expect an equitable distribution of the balance. The present suit*, being instituted by a private person without the consent of the Government, *would exhaust the entire bond*, and such a situation cannot be reconciled with the *primary* purpose of the statute, which is to provide means whereby the losses of the Government will be *first* indemnified. Certainly, such circumstances have a bearing upon the ultimate interpretation which should be made with reference to the intent of Congress" (R. 81). (Italics supplied.)

(In passing, we respectfully assert that "the *moral* obligation of the Government to protect the patrons of the post office" can be best discharged by taking a bond that makes the postal patrons *legal* beneficiaries thereunder. In fact, if the bond does not cover the patrons' losses, there is nothing that the Government can recover on their behalf. So, with all due respect to Judge Nordbye's opinion, we submit that "the moral obligation of the Government to protect the patrons of the post office" is the spirit of the bond and of the statute under which the bond was given, and that that spirit accords with the letter of the bond and the statute.)

Once it be determined that the bond involved in the case at bar was for the joint benefit of the Government and users of the mail, even though for the *primary* benefit of the Government, the plaintiff's showing that it is the only claimant against the bond, and that the Government has no claim against the bond, establishes plaintiff's right to recover, without regard to what difficulties may arise in other and future cases where there are more claims than can be discharged by another bond.

A contract need not be *exclusively* for the benefit of a third party in order to give him a right thereon.

Hartman Ranch Co. vs. Associated Oil Co., 10 Cal. (2d) 232.

In *Ohio Casualty Ins. Co. vs. Beckwith* (C. C. A. 5), 74 Fed. (2d) 75, 78, the Court said, in holding that a third party was entitled to sue on a liability policy:

> "Where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit on him and furnish him a remedy. 81 A. L. R. 1287; *Durasher vs. Rau*, 135 N. Y. 219, 32 N. E. 49. *And this is so, although the*

primary purpose of the parties to the contract was to benefit themselves. Byram Lumber Co. vs. Page, 109 Conn. 256, 146 A. 293. In such a case the third party need not be known or know of the contract at the time it is entered into; it is sufficient that he can be identified and is able to establish the fact that he is a beneficiary. *Whitehead vs. Burgess*, 61 N. J. Law 75, 28 A. 802." (Italics supplied.)

III (e).

Departmental Regulations Do Not Restrict Bond Coverage.

(See Assignment of Error No. 3.)

We respectfully submit that the Circuit Court of Appeals erred in holding that regulations of the Post Office Department may be considered in determining whether or not 39 *U. S. C.* A., Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452). The Circuit Court of Appeals says:

> "It is reasonable to presume that Congress intended primarily to protect that interest"—the Government's interest in the integrity of its postal employees—"in enacting the statute requiring postmasters to give bond. The related statutes *and postal regulations* all point to this conclusion. No inference can be drawn from them that Congress intended to extend the protection of the bond to private mail-users." (Italics supplied.)

The Circuit Court of Appeals does not specify the regulations that are conceived to negative an intention of Congress that private mail-users be protected. The opinion refers to but two regulations: Postal Laws and Regulations, 1932, Secs. 777 and 816. Sec. 816 merely provides departmental procedure for recovery from postal employees for certain

losses due to wrongful delivery of mail, and that amounts recovered "shall be paid to the United States *and to the senders or owners of the mail as their interests shall appear.*" (Italics supplied.)

So, Sec. 816 recognizes, rather than negatives, a *beneficial interest* in "senders or owners of mail" on bonds of the general character here involved.

Because Sec. 816 deals with remedies rather than substantive rights we defer a discussion of the effect of this regulation to the later part of this brief, dealing with plaintiff's remedial rights. But the part of the section which we have above italicized does recognize the *liability* of postal employees for losses caused to senders or owners of mail, whatsoever may be the remedy to enforce that liability.

As to Sec. 777, it provides, first, that mail *should* be delivered to the addressee or on his written order. It then provides that if a third person requests delivery of mail, "*claiming that the addressee has verbally given him authority to receive it*, the postmaster, if he doubts the authority, may require it to be in writing," etc. The postmaster in this case cannot excuse his wrong as having involved the exercise of discretion under this regulation, even if the regulation be regarded as consistent with the statutes governing delivery of mail. (1) There is no showing that Hunting claimed that he had verbal authority from any of the addressees to receive mail addressed to them. (2) The section obviously does not contemplate any discretion in a postmaster to deliver to a single person mail addressed to more than a hundred different persons. (See Exhibit B, R. 21-23, which lists more than 80 different persons as purported purchasers of cars from Hunting, under pretended conditional sales contracts fraudulently sold by him to plaintiff.) Plaintiff's mail was addressed not only to the purported

purchasers, but also to credit references purported to have been given by the purchasers (R. 71-72).

Sec. 777 should not be read as providing a postmaster with a shield against liability for mass diversion of mail. In the face of the strict measures which Congress itself has set up to safeguard against unauthorized delivery of mail, the most that should be said of Sec. 777 is that it gives slight discretion to a postmaster in delivering mail addressed to a single addressee—as where one member of a family requests delivery to him of mail addressed to another, under circumstances that raise no suspicion that the recipient intends to divert the mail from the addressee. If the section be read as having purported to give the postmaster in this case discretion to deliver to Hunting all of the hundreds of letters that plaintiff sent to more than one hundred persons at Montgomery, in face of the postmaster's knowledge of Hunting's business relations with plaintiff (R. 72), then we assert that, to that extent at least, the regulation is a nullity as being in conflict with the policy expressed by Congress in the mail statutes to which we have referred in our Statement of the Case and in Subdivision III of this argument.

In *Campbell vs. Galeno Chemical Co.*, 281 U. S. 599, this Court said:

> "The limits of the power to issue regulations are well settled. *International R. Co. vs. Davidson*, 257 U. S. 506, 514, 66 L. Ed. 341, 343, 42 Sup. Ct. Rep. 179. They may not extend a statute or modify its provisions." (281 U. S. 609-610.)

The principle involved in what was said in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 597 (writ dismissed, 192 U. S. 601), is equally applicable to statutory duties imposed upon postmasters, to liability under bonds given for the

faithful discharge of duties, and to remedies available for the enforcement of such liability:

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter, and what is matter of the third class. *It has reserved that power exclusively to itself.* * * * And it is not competent for the Postmaster General to add anything to the statute or to take anything from it." (Italics supplied.)

If the action of Congress in classifying mail is to be deemed to exclude departmental regulations, for much stronger reasons regulations can neither add to nor detract from Congress' expressed intention that a postmaster's bond shall operate to the benefit of mail-users, and cannot alter the Congressional will or intent that mail-users shall be permitted to sue on the bond, even though such will or intent arises from implication rather than explicit provision.

Meads vs. United States (C. C. A. 6), 81 Fed. 684, was an action on a federal land office receiver's bond. The effect of departmental regulations upon the scope of liability existing under the bond was considered. The Court quoted from *United States vs. Symonds*, 120 U. S. 49, 30 L. Ed. 557, where this Court observed that the power of the Secretary of the Navy to issue regulations was "subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress;" and that the Secretary might "establish regulations in execution of, or supplementary to, *but not in conflict with, the statutes defining his powers or conferring rights upon others.*" (Italics supplied.) Applying the principle thus laid down by this Court to regulations affecting official

bonds, the Circuit Court of Appeals, in the cited case, said:

> "In what was thus said it is implied that the general laws of Congress *with respect to the rights of the public in dealing with these official agencies, as well as the obligations arising out of the execution of these bonds, and the rights of the Government thereunder*, cannot be changed *by mere department regulation.*" (Italics supplied.)

It is to be noted that the Circuit Court of Appeals does not limit its holding to a decision that there was no breach of the bond in the case at bar, but broadly holds that in no case can a private mail-user sue on a postmaster's bond. Manifestly, such a decision should rest on broader considerations than the mere effect of Sec. 777 of the Postal Laws and Regulations. Otherwise, a postmaster would not be liable on his bond for the most culpable mishandling of mail —not even for malicious destruction of private letters. There should be ample room for judicial determination whether or not a particular act constitutes a breach of duty toward a mail-user, but no room left for doubting the liability of the bond for any loss directly caused by any breach of duty by the postmaster, whether the wrong be against the Government or a private mail-user.

For regulations of the Postmaster General that have a bearing on the issues presented, but which are overlooked by the Circuit Court of Appeals' opinion, see pages 9-10 of this brief. The opinion does not take into account the postal *statutes* cited and summarized at pages 7-9 hereof, under the subhead, "Statutes Concerning Mail Delivery."

IV.

The Bond Coverage Is as Broad as the Postmaster's Liability in Tort to Mail-Users.

(See Assignments of Error Nos. 4, 8.)

By observing "that this is not an action against the postmaster sounding in tort" (R. 104; 103 Fed. (2d) 451), the Circuit Court of Appeals intimates that a postmaster may be personally liable to mail-users in tort for failure faithfully to discharge certain duties imposed upon him by law, or departmental regulations, but that his bond will not cover those duties, although it be conditioned for the faithful performance of *all* of his duties imposed by law or regulation. We respectfully submit that if the Court really meant to say that we could have sued in tort, but could not sue on the bond, the conclusion is contrary to well-settled law.

The last quoted observation by the Circuit Court of Appeals intimates recognition that the Record shows that the postmaster rendered himself liable in tort. In the next subdivision of this brief we comment upon the state of the Record in that regard.

Howard vs. United States, 184 U. S. 676, holds that an official who breaches his official duty to the prejudice of a private person is liable on his bond conditioned for the faithful discharge of his duties. Numerous decisions in the state and federal courts, which have followed the *Howard Case* (see citations in *Rose's Notes* and in *Shepard's United States Citations*), show that the *Howard Case* has been generally regarded by the courts throughout the country, both state and federal, as stating a general rule, and not an exception to a general rule. This is instanced by what the Circuit Court of Appeals, Seventh Circuit, said concerning

that case in *Moody vs. Meyer*, 41 Fed. (2d) 515: "This case states a general rule." Of course, it is true as held in the last cited case, that "there can be no liability on an official bond, unless there is a breach of official duty" (p. 516). But is it not equally true, as a converse proposition, that there *is* liability on a bond, like the one at bar, when there is a breach of official duty?

Does not 39 *U. S. C. A.*, Sec. 34, manifest a purpose to require *security*, to a limited amount, for the discharge of the same liability that would rest upon a postmaster if he were sued in tort instead of on his bond? In other words, is not his secured liability at least as broad as his unsecured liability?

First, the statute says that the bond shall be "in such penalty as the Postmaster General *shall deem sufficient*." This gives better opportunity for securing both the Government and private persons than was possible under the statute involved in *Howard vs. United States*, 184 U. S. 676, where no bond in excess of $40,000 could have been required.

Second, the statute does not limit the coverage to duties prescribed by the postal *statutes* and regulations. It covers "all duties and trusts imposed on him either by *law* or the rules and regulations of the department."

The phrase, "duties * * * imposed * * * by *law*," include the postmaster's duties under the common law, as well as those rising out of statutes.

In *State vs. Dyer*, 67 Vt. 690, the Court said of a statute which designated the institutions to which commitment of prisoners should be made, for criminal offenses "declared by law":

> "The words 'declared by law' do not necessarily or reasonably mean statute law only, but include the com-

> mon law whenever it defines an offense and makes it punishable by imprisonment."

In civil matters, at least, unqualified use of the term "law" embraces both statutes and the common law.

Tennessee Coal, etc., R. Co. vs. Roussell, 155 Ala. 435.

In re Finks (D. C., W. D., Va.), 41 Fed. 383, the Court recognized that the "duties" for the performance of which a Federal Court clerk is bonded are not limited to statutory duties, but include, also, duties daily performed by him, though not of statutory origin.

That an administrative federal official may be held liable for violation of a duty that inheres in his office, although not *specifically* imposed by law or regulation, was also recognized in *Sclover vs. Shardown*, 73 Minn. 393. There a Federal Circuit Court clerk was held liable in tort for negligently misinforming an attorney that judgment in a certain case had not been entered. From the fact that a statutory fee was collectible by the clerk for making a judgment search, the Minnesota Supreme Court decided that it was the clerk's official duty to furnish plaintiff with correct information. The Court said:

> "It is a general rule that wherever an individual has suffered injury from the negligence of a ministerial officer, in the discharge of a special duty to himself, an action lies on behalf of the party injured, for the action is founded, not on contract, but on breach of duty.",

So, if there were no statute or regulation expressly forbidding a postmaster to destroy a private letter coming into his hands for delivery, or as in the case at bar, virtually to destroy it by deliberately delivering it to a person not en-

titled to it, the postmaster nevertheless would be guilty of a breach of duty imposed by *law*.

Third, the last sentence of the statute—39 *U. S. C. A.*, Sec. 34—clearly indicates that Congress intended that the coverage of a postmaster's bond should be at least as broad as his tort liability. That sentence reads: "The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, *and she shall be liable for misconduct in office as if she were sole.*" The implication that Congress had in mind the well-established doctrine (see Point V, *post*) that a man or a single woman, serving as postmaster, is liable in tort to private persons for *official misconduct* toward them is unavoidable. So, we have within the scope of a single section, first a requirement for *security* for the faithful discharge of all *official duties*, and then a recognition of liability of all postmasters, in tort, for *misconduct in office*. Clearly, the phrase, "misconduct in office," in the last sentence of the statute, is merely the converse of the phrase, "faithful discharge of all duties," etc., in the first sentence.

The following authorities show that the Courts generally regard *breach of official duty* and *official misconduct* as not only meaning the same thing, but as covering wrongs against individuals as well as wrongs against Government:

National Surety Co. vs. State Savings Bank (C. C. A. 8), 156 Fed. 21, 23-24, where the Court treated "official delinquency" as the equivalent of "misconduct in office."

Miller vs. Roby, 6 Neb. 471.

Etzler vs. Brown, 58 Fla. 221.

State vs. Examining and Trial Board, 43 Mont. 389.

Even if the statute had not contained an explicit recogni-

tion by Congress of a postmaster's tort liability, in such context as to express intention to treat bond coverage as extending to the full scope of tort liability, the same result would follow as a matter of necessary inference. Failure faithfully to discharge a postmaster's duties is the principal ground on which liability is enforceable whether recovery be sought on his bond or in tort.

Such was the position taken in *United States vs. Griswold*, 8 Ariz. 153, where the Court said:

> "It is a part of the duty of the postmaster to safely keep and to transmit the mails, including registered packages, which may be given into his hands as such postmaster. His oath of office requires him to faithfully perform the duties of his office. It is a general proposition that a public officer, having ministerial duties to perform, is liable for any injury occasioned by him in consequence of his failure to perform his official duty. *Raynsford vs. Phelps*, 43 Mich. 344, 5 N. W. 403, 38 Am. Rep. 189. *Thus it has been held that a postmaster is liable in damages for conversion of mail matter at the suit of the person injured. Teal vs. Felton*, 12 How. 284, 13 L. Ed. 990. It has also been held that a postmaster is liable for the loss of a letter containing money, occasioned by his negligence, at the suit of the sender. *Dunforan vs. Grant*, 14 Vt. 283, 39 Am. Dec. 224. *If a Postmaster can be held responsible in damages for loss of mail matter occasioned by his negligence, it must be for the reason that he has been derelict in his duty as such officer. Such a failure, under the condition of his official bond that he will 'faithfully discharge the duties of his office,' amounts to a breach of the bond; and in such a case the liability of the principal is the measure of the liability of the surety.*" (Italics supplied.)

United States vs. Roade (D. C., S. D.), 214 Fed. 283, was an action against a postmaster on his bond for loss of a reg-

ered package, for which loss he was not personally at fault. Relating the postmaster's tort liability to the liability on his bond, the Court said:

"My attention is specifically called by plaintiff to plaintiff's claim that the condition of the bond is breached by admitting the receipt of the registered parcel, and the refusal and failure of the postmaster to deliver the registered parcel, on demand of the addressee. The evident reply to this, in the light of my construction of the rules and regulations, is that they do not hold the postmaster responsible, or the postmaster and his bondsmen liable upon their bond, for the wrong delivery; depredation upon, or loss of any registered letter or parcel, while in the postmaster's custody, *unless such wrong delivery, depredation, or loss is due to negligence or disregard of the regulations by such postmaster.*" (Italics supplied.)

An official bond covers a tort committed under color of office.

Pierce vs. Chapman, 167 Miss. 749.

22 *R. C. L.*, p. 506, Sec. 190.

From *Taylor vs. Shields*, 183 Ky. 669:

"Where there is a duty imposed by law on a police officer, * * * if the duty is neglected, or performed in an improper manner, the surety is liable."

From *Stronk vs. Ocheltree*, 11 Iowa 158, 159-160:

"He did this as an official act. The wrong was committed by color of his office, a wrong which his sureties obligated themselves he would not do, and for which they should be held responsible."

From *County of Mower vs. American Bonding Co.*, 133 Minn. 274, 276-277:

"The cases involving the liability of sureties for default of public officers are numerous and the decisions conflicting. *The courts agree, however, in holding sureties liable for unfaithful or improper conduct of officers in the performance of acts or duties which the law authorized or required him to perform.* This court, following the weight of authority, also holds the surety liable for a trespass upon person or property committed by the officer while acting within the scope of his official authority, and while purporting to act in his official capacity." (Italics supplied.)

Therefore, we are brought within a well-established legal principle that, except as otherwise clearly provided, the law intends that liability on an official bond to discharge duties shall be *co-extensive with the liability of the officer himself.* In addition to authorities above cited in this subdivision, see, also:

Seneca Independent School District vs. Traver, 63 S. D. 68.

50 C. J. 74, Sec. 127.

Whittaker vs. United States Fidelity & Guaranty Co. (D. C., Mont.), 300 Fed. 129.

Fayette Title & Trust Co. vs. Maryland, etc. (C. C., W. D., Pa.), 180 Fed. 928.

People vs. Schuyler, 4 N. Y. 173.

Skinner vs. Phillips, 4 Mass. 69.

Harris vs. Hanson, 11 Maine 241.

People vs. Merserean, 74 Mich. 687.

Hall vs. Tierney, 89 Minn. 407.

American Guaranty Co. vs. McVicee, 111 Ohio St. 532.

Richland County vs. American Surety Co., 92 S. C. 329.

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, where the surety was held liable on a letter carrier's

bond for mishandling of letters, in violation of regulations adopted after the bond was given, the Court said:

> "But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability, which by the plain terms of the contract he agreed to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post Office Department," etc.

The Court's decision in *National Surety Co. vs. United States*, 129 Fed. 70, *supra*, was followed in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, an action on a postmaster's bond. Holding that a bond, conditioned substantially the same as the one at bar, covered losses by senders of mail, regardless of the Government's liability to the senders, the Court said:

> "Should the government be allowed so to recover, it would hold the amount recovered upon an implied trust for the owners of the property. To allow such a recovery would not, in our opinion, be holding the sureties to any liability not clearly within the reasonable contemplation and the intention of the parties when the bond was given."

The decisions in the two cases last cited conclusively settle the point that when the surety in the case at bar executed the bond it rendered itself *liable* for the mishandling of the plaintiff's mail. It was bound to foresee that that liability would be enforced in such action as the law should permit

to be brought. The right of the Government to sue for the benefit of users of the mail had been judicially determined in the cases last cited, and other cases herein cited. And this Court had held in *Howard vs. United States*, 184 U. S. 676, that a private beneficiary of such a bond as this may sue on it in his own right. So, not only was the *substantive* right of the plaintiff a matter within the contemplation of the parties to the bond at bar, but also plaintiff's *remedial* right.

The surety being a compensated surety, its undertaking must be most strongly construed in favor of claimants against the bond, although they are not formal parties to it.

50 *C. J.* 80, Sec. 133.

77 A. *L. R.* 42-46, 49.

Even under the strictest construction of the liability of the surety, the liability must be held to extend to losses sustained by senders of mail.

United States vs. Griswold, 8 Ariz. 453.

In *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019, the case was decided in a memorandum opinion based upon the decision *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and upon 28 *Op. Atty. Gen.* 476, 479.

The Attorney General's opinion, to which reference is made in the *American Surety Co. Case*, was rendered by Hon. Philander C. Knox. It dealt with the right of the Government to recover on a postal clerk's bond for the full loss resulting from his theft of a private registered letter, where the Government's liability to the sender was limited. In part, the opinion reads:

"* * * the contract is not one of strict and narrow indemnity, and whether it is called one of suretyship or fidelity insurance, its meaning and purpose are clear, viz., to assure the faithful performance of all the employee's duties, and the result, to a plain understanding, is the assumption by the obligor of liability for the consequences of all failures of the principal to perform his obligations up to the amount of the principal sum named in the bond. * * * the contract broadly covers all trusts and obligations imposed and must contemplate and include all consequences of a breach of the plainly expressed condition. I think it will be clear from present consideration of the language of the law and the bond, and in view of the well-known dealing and policy of the Government toward its dishonest employees and those who are losers by their dishonesty, that if the intention had been to limit the surety's liability to the amount of the Government's strict legal liability, the language of the instrument would have been different."

23 *Op. Atty. Gen.* 476, 479-481.

The rule that a bond for the faithful performance of an employee's duties is to be construed most strongly against the sureties applies to official bonds.

Carlton vs. Detroit Fidelity & Surety Co., 112 Fla. 644.

In *National Surety Corp. vs. Seward*, 31 Ohio App. 206, where a postmaster's surety was held to be entitled to be reimbursed for a discharge of his primary liability, the Court said:

"We assume that the plaintiff was a paid surety, and that the transaction amounted to a contract of fidelity insurance. In such case, for the purpose of determining the liability of the surety to the United States, the contract should be construed according to the rules applicable to insurance contracts. *George A. Hormel & Co. vs. American Bonding Co.*, 112 Minn. 288."

Concerning a county auditor's bond, conditioned for faithful performance of his official duties, it was said in *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407-408:

> "And another suggestion occurs that *this rule of strictissimi juris applies rather to the words of the bond as written and signed by the sureties, and is not to be extended to modify the language of the statute defining the duties in such a way that it would not be modified if no question of suretyship were involved.* The construction of the words of the statute must be the same in either event." (Italics supplied.)

What was said in *United States vs. Bryan* (C. C., N. D., Cal.), 82 Fed. 290, 294, affirmed (C. C. A. 9), 90 Fed. 473, concerning reasons for holding a postmaster liable on his bond for acts of his subordinates, suggests still better reasons for imposing strict liability for his own deliberate wrongs:

> "A full appreciation of the absolute liability will tend to greater vigilance and scrutiny on the part of postmasters over the acts of their subordinates, and *will tend to preserve the efficiency of the postal service. Any other rule would lay the door wide open for frauds, which could be practiced with impunity, to the demoralization of the service.*"

The statutes which make certain acts by a postmaster criminal offenses are indicative of the legislative intent that those acts be covered by his official bond.

In *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 409, the Court declared concerning a county auditor's bond for faithful discharge of his duties:

> "It was deemed advisable, in compelling the officer to act faithfully and honestly in such a matter, to enforce

that fidelity and honesty by criminal penalties; and, *while the penal statute adds nothing to the civil bond, it is a very important circumstance to evince the solution that the legislature of Ohio gives to the question whether such conduct is ex virtute officii or colore officii, or so much on the outside that it does not belong to the office at all. It is a legislative construction of the laws of Ohio and of the official bonds that are required to be given. It punishes the officer for a malfeasance in office also, even if it is a punishment to the individual as well for an offense against him who is injured. It goes to both wrongs.*" (Italics supplied.)

From *State vs. McGuire*, 46 W. Va. 338:

"Sureties stand 'on the letter of the bond,' it is true, and it cannot be stretched as a general rule; but the law in force at the execution of the bond, giving it a certain legal effect, is part of the bond, and sureties engage with eyes open to that law."

An official's sureties stand in the shoes of the official. "Regardless of the form of the action, such suit is bottomed on the tortious acts of the public officer," etc.

Pullman Car & Mfg. Corp. vs. Hamilton, 236 Ala. 209.

IV (a).

The Record Shows That Defendant Postmaster Rendered Himself Liable in Tort to Plaintiff.

So far as the postmaster is concerned, for present purposes, there does not appear to be any claim that he did not become liable to plaintiff for his wrongful acts. After the action was ordered dismissed as to the surety (R. 87), the lower court ordered dismissal as to the postmaster, on the sole ground that, with the surety out of the case, the Court

was without jurisdiction to proceed against the postmaster (R. 88). The latter order was, of course, made on the ground that an action between plaintiff and the postmaster would present no diversity of citizenship. (Since the action arises under the federal laws it would seem that jurisdiction of the action existed regardless of diversity of citizenship.)

The trial judge stated in his opinion:

> "The jury found that Malone's *wrongdoing* was the direct cause of plaintiff's loss; that Malone *violated his duties as postmaster;* and that, *as the proximate result of such violation, the plaintiff sustained a money loss,* at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72). (Italics supplied.)

The postmaster's liability in tort to plaintiff on the facts found by the jury does not appear to be questioned. The surety tacitly conceded such liability in its motion for a directed verdict, for that motion was made, in part, on the ground "that the evidence negatives any misconduct, carelessness or violation of rules by the defendant Malone," etc. (R. 55). The surety nowhere asserted in its motion that Malone was not liable if he was guilty of misconduct, violation of rules, etc. (R. 54-55, 61-62). The surety's motion to dismiss the complaint (R. 64-65) on which the order appealed from was based (R. 70-87) is even narrower than the motion for a directed verdict, in that it did not specifically assert any non-liability on Malone's part. Nor did the surety's answer (R. 30-32) assert any such non-liability on Malone's part.

As to the postmaster's answer and motions, they did not deny liability on the ground that his wrongful acts would

not make him liable to plaintiff. His answer is devoid of any such claim (R. 32-34). He adopted the surety's motions for a directed verdict as his motions (R. 55; 63), with an added assertion that his defaults, if any, were not the proximate cause of plaintiff's loss (R. 63). The postmaster's motion to dismiss the Complaint (R. 65-66), which as above noted was granted on the sole ground that there was no diversity of citizenship, with the Surety Company out of the case, does not question the liability of a postmaster to a user of the mails, apart from liability created by his bond.

V.

That Postmasters Are Directly Liable for Their Wrongs Against Mail-Users Is an Old and Well-Established Doctrine.

(See Assignments of Error Nos. 5, 8.)

In Subdivision VII (b), *post*, we draw attention to the fact that our postal system originated in the British system; and to a general recognition that both systems exist primarily for the benefit of the people, and that postmasters are regarded in all English-speaking countries as servants of the people. Therefore, the Empire reports, as well as the American reports, aid in sensing a generally recognized policy to make postmasters responsible for their wrongs, directly to those wronged. Incidentally it will be discovered that the policy is as old as the modern postal system itself.

> "The duty arises out of a great public trust, since the legislative establishment of the post office by the Statutes of Charles the Second and Queen Anne. * * *
>
> "We think that, in all cases, deputies"—the counterpart of American postmasters—"are answerable for

their own personal misfeasance, such as detaining the letters in question."

Rowning vs. Goodchild, 2 Wm. Bl. 906, 96 Reprint 536, 3 Wils. C. P. 443, 95 Reprint 1147.

In the cited case, it was held that a postmaster was liable for failing to deliver letters to an addressee at the addressee's place of abode.

Accordingly:

Smith vs. Dennis, or Dennison, Lofft 753.

Barnes vs. Foley, 4 Burr. 2149, 5 Burr. 2711, 1 Wm. Bl. 643.

Smith vs. Povelich, 1 Cowp. 182.

Stock vs. Harris, 5 Burr. 2709.

Edwards vs. Dickenson, 12 Mod. 6.

Carey vs. Lawless, 13 U. C. Q. B. 285.

Campbell vs. McPherson, 6 U. C. (O. S.) 34.

Bainbridge vs. Postmaster-General (1906), 1 K. B. 178, 75 L. J. K. B. 366, recognizes the liability of a postmaster "for any fault of his own."

From Lord Mansfield's opinion in *Whitfield vs. Despencer* (K. B.), 2 Cowp. 754, it appears that interference by a postmaster or postal employee with the safe flow of private mail has long been regarded as a serious wrong against mail-users. After a mail sorter had been executed for stealing a bank note from a letter, it was sought to hold the Postmaster General liable in damages for plaintiff's (the sender's) resulting loss. Defendant escaped liability only on the ground that he was not liable for the wrongful acts of his subordinates, in which he had not participated. It was observed that the giving of security to the Crown by inferior postal officials afforded one good reason for exempt-

ing the superior from liability for their acts. But it was pointed out that a postmaster was liable for his own fault. The Court said:

> "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable. * * * So is the postmaster for any fault of his own."

The last cited case followed *Lane vs. Cotton*, 1 Com. 100, 12 Mod. 47 (2 Mod. 108, 5 Mod. 455), 1 Salk. 17, 143, Carth. 487, Holt K. B. 582, 1 Ld. Raym. 646.

In Australia a postmaster escaped liability for wrongful stoppage of plaintiff's mail, because the wrong was committed without his direction or knowledge.

Bell vs. Duffy (Victoria Sup. Ct., 1898), 4 Argus L. R. (Current Notes) 57.

American Decisions.

"The doctrine of these English cases has been recognized in this country and applied to the post-office department of the United States: *Dunlop vs. Munroe*, 7 Cranch 242; *Schroyer vs. Lynch*, 8 Watts. 453; *Conwell vs. Voorhees*, 13 Ohio 523."

Hutchins vs. Brackett, 22 N. H. 248.

As early as 1812 this Court intimated the liability of a postmaster for the mishandling of mail, through his own negligence or wrongdoing. The intimation appears in *Dunlop vs. Munroe*, 7 Cranch 242, an action against a postmaster for wrongfully withholding a letter containing bank notes. The Court found (p. 269) that the question present-

ed was "whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence neglect in the assistant acting under him. * * *" The Court decided:

> "If it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and *his liability then will only result from his own neglect* in not properly superintending the discharge of their duties in his office." (Italics supplied.)

From the notes appended to the report of the cited case, at 3 L. Ed. 329, we quote:

> "A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies, nor for the contents of a lost letter, *unless he has been guilty of negligence*, and the loss was the consequence of such negligence. *Wiggins vs. Hathaway*, 6 Barb. 632.
>
> "Deputy-postmasters are not liable, except for loss caused by their own fault or negligence; *and for that they are liable. Rowning vs. Goodchild*, 3 Wils. 443; *Maxwell vs. McClory*, 2 Bibb. 211; *Christy vs. Smith*, 23 Vt. 663; *Bolan vs. Williamson*, 2 Bay. 551; S. C. 1 Brevard 181; 2 Pars. on Cont. 144." (Italics supplied.)

(Note: It will be observed that some of the early American cases cited in this brief refer to postmasters as "deputy-postmasters," because originally all postmasters were regarded as deputies of the Postmaster General, both in England and in this country.)

In *Teal vs. Felton*, 12 How. 284, this Court decided that the wrongful withholding of mail matter by a postmaster from an addressee was a conversion for which suit might be brought against the postmaster by the addressee. For like reasons, a postmaster's wrongful delivery of letters to an

unauthorized person, in violation of departmental regulations, must also be actionable.

Keenan vs. Southworth, 110 Mass. 474, was an action in tort against a postmaster for loss of a letter addressed to plaintiff. The loss was due to neglect of the postmaster's clerk, and plaintiff exonerated the postmaster of "any actual participancy or knowledge." The Court said:

> "The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders."

In *Coleman vs. Frazier*, 4 Rich. (S. C.) 146, a postmaster was held liable to the sender of a letter for pilferage of the letter by one who was permitted to have access to mail, in violation of postal regulations.

In *Wentworth vs. Smith*, 44 N. H. 419, evidence was offered to show that letters received at the post office of which defendant was postmaster had been put into drawers of persons to whom they were not addressed, and that other letters were delivered to persons other than the addressees. This evidence was held not admissible to show that a particular letter had been negligently handled, because negligence in a specific instance could not be proved by negligence in other instances. But the opinion shows, by necessary inference, that if it had been proved that loss had resulted from delivery of the particular letter to an unauthorized person, the postmaster would have been liable.

It was just as much incumbent upon the defendant postmaster to know that he had no right to deliver plaintiff's mail to Hunting, unless it was addressed to him, as it was

incumbent upon the postmaster in *Bishop vs. Williamson*, 11 Me. 495, 507, to know that he had no right to permit one to have access to mail in the office unless that person had been sworn in as an assistant. There the postmaster was held liable in damages for misdelivery of a letter.

The right of an addressee of mail to hold a postmaster liable in damages for detention of mail not authorized by statute, was intimated in *Commerford vs. Thompson* (C. C., Ky.), 1 Fed. 417, 422, although injunction against the detention was denied for want of equity arising through lack of a showing that the letters did not pertain to a lottery business conducted by plaintiff.

In *Polk vs. Garrison*, 162 Ark. 624, one Bomb forged plaintiff's signature to a telegram requesting a bank to send plaintiff a sum of money by registered mail. By impersonating plaintiff, Bomb secured the letter from the post office of which defendant was postmaster and misappropriated the money. The Court held that plaintiff could not recover from defendant postmaster, because plaintiff had sent nothing through the mails and had authorized nothing to be so sent. The Court said that if plaintiff had ordered the money sent to himself, misdelivery to one impersonating him would have rendered the postmaster liable. The Court left undecided the question whether the bank could recover from the postmaster.

In *Raisler vs. Oliver*, 97 Ala. 710, the Court recognized that a postmaster is liable for mishandling of letters where it is proved that loss results to a mail-user as a direct consequence of the postmaster's failure to "exercise that care and prudence in regard to the letters that a reasonable and prudent man would in regard to his own business."

Ford vs. Parker, 4 Oh. St. 576, is to the same effect.

A postmaster is liable for loss of mail resulting from his neglect properly to superintend his office.

Schroyer vs. Lynch, 8 Watts, (Pa.) 453.

In addition to the above cited authorities, see the following cases which sustain the point under argument, and which have been hereinbefore cited as showing that bond liability and tort liability are correlated:

United States vs. Rogde (D. C., S. D.), 214 Fed. 283.

United States vs. Griswold, 8 Ariz. 453.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

VI.

The Degree of the Postmaster's Culpability Is Unimportant.

(See Assignment of Error No. 2.)

Defendant postmaster deliberately delivered to Hunting letters to which the latter was not entitled under the postal laws and regulations (R. 71-72; 23 Fed. Supp. 412-413). Therefore, this appeal does not present any question as to liability on a postmaster's bond when he acts inadvertently.

That defendant Malone, in violation of his duties as postmaster, wrongfully misdelivered plaintiff's mail is undisputed and indisputable upon the record (R. 72). As to the degree of his culpability, the most favorable consideration that he or his surety can claim is afforded by the trial judge's statement of these facts: "The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not *directly* establish that Malone was knowingly a party to the *fraud*. [Here the trial judge refers to Hunting's fraud against plaintiff.] Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to

convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster," etc.

The surety's argument at page 18 of its brief presented to this Court in reply to our petition for certiorari indicates that it will continue reliance on an assumption that Postmaster Malone did not know what was in the letters which he wrongfully delivered to Hunting. Our answer to that position is:

1. The finding that there was no *testimony directly* showing that the postmaster knew just what sort of fraud Hunting was perpetrating on plaintiff does not negative the existence of *circumstantial evidence* warranting a finding that Malone did have such knowledge. In fact, there was circumstantial evidence from which the jury could infer that the postmaster knowingly was a party to the fraud:

> "The testimony indicated *Malone knew of Hunting's business relations with the plaintiff*," etc. (R. 72). (Italics supplied.)

At pages 8-9 of its reply to the petition for certiorari, the surety seeks to avoid a consideration of this phase of the case because the evidence bearing on it is not shown by the Record. We reply that the statement of facts made by the trial judge (R. 72), from which the Circuit Court of Appeals derived its statement of facts (R. 103), sufficiently shows that the postmaster knew that Hunting was an *automobile dealer* and that the diverted mail was being sent by a

"loan finance company." Those two facts, also, were sufficient to apprise the postmaster as to the probable nature of the correspondence, and Hunting's request that the correspondence be delivered to him compelled a suspicion that Hunting was actuated by some unlawful purpose prejudicial to plaintiff that could be effectuated only through the postmaster's co-operation.

2. The postmaster's violation of his official duties was an actionable breach of his bond, whether he knew the contents of the letters or not and whether he knew or did not know what purpose the wrongful diversion of the mail served Hunting.

3. Obviously, his wrongful diversion of the mail is not excusable on the ground of Hunting's "dominant personality." As shown by *Commerford vs. Thompson*, 1 Fed. 417, 419, not even the dominating influence of the Postmaster General could have justified the postmaster in delivering plaintiff's mail to a person other than the addressee.

That the gist of the postmaster's wrong lay in the diversion of the mail from the addressees, regardless of what he knew about their contents, appears from the penal provisions of 18 *U. S. C. A.*, Sec. 318:

> "Whoever, being a postmaster * * * shall unlawfully *detain, delay* * * * any letter * * * which shall come into his possession, and which was intended to be * * * delivered from any post office; * * * or shall *secrete, embezzle or destroy* any such letter, * * * shall be fined not more than $500, or imprisoned not more than five years, or both." (Italics supplied.)

It will be noted that this statute does not make knowledge on the part of the postmaster as to the nature of the contents of a letter an element of the offense, and no reason is

apparent why such knowledge should be regarded as important where he and his surety are sought to be held civilly liable. For the purposes of this action, we assert that the spirit of this statute, if not its letter, shows that Congress regards it as being a gross breach of a postmaster's official duty to impede the delivery of the mail to the addressee or its return to the sender, whose return card appears on the envelope, regardless of the postmaster's knowledge as to the contents of the letter.

Postmasters and postal employees have no right to speculate upon the importance of letters; their duty is to deliver them to the addressees or put them through the regular channel provided for undeliverable mail.

Goode vs. United States, 459 U. S. 663, 671.

Even when a postmaster is prosecuted for violating 18 *U. S. C. A.*, Sec. 318, by detaining, delaying or embezzling a letter, it is no defense that the letter contained nothing of value.

United States vs. Lachner, 134 U. S. 624.

United States vs. Gruver (D. C., S. C.), 35 Fed. 59, 61.

United States vs. Delany (C. C., S. C.), 55 Fed. 475, 476.

Not even a good-faith belief that a letter contains nothing of value to the addressee will justify its delivery to an intermeddler.

United States vs. Nutt (D. C., Ohio), Fed. Cas. No. 15,904.

That "Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and * * * was able to convince Malone that it was perfectly proper

for the 'Midland mail' to be delivered to him" (R. 72), can afford no semblance of excuse for Malone's violation of the statutes and regulations governing his duties in the handling of mail. It affords less semblance of excuse than was involved in *United States vs. Moore* (C. C. A. 2), 168 Fed. 36, also an action on a postmaster's bond. It was there decided that the postmaster was bound to take notice of a statute that forbade detailing of clerks from any branch of the postal service to the offices of the Department in Washington, and that he was liable on his bond for enabling clerks, *whom he had appointed in his office on order of the Post Office Department*, and who rendered no service there, to secure pay. The Court said (p. 38), that defendant was "charged with knowledge of this statute whether he was aware of it or not." The Court added:

> "The defendant acted in entire good faith, without any purpose or intent of defrauding the government. He supposed that his superior officers were more familiar than he was with the voluminous and complicated statutes and regulations of the department, and followed their instructions with no suspicion that his doing so was any breach of duty. * * *
>
> "Unfortunately for him, entire good faith and the most honest intentions are no defense."

Had the postal laws vested the postmaster with *discretion* in delivering mail, and had the postmaster in this case merely erred in a *bona fide* attempt to *perform* his official duties, a different legal situation might have been presented. But, as shown by the statutes and regulations set forth in the Statement of the Case, no discretion was vested in him concerning the delivery of letters. The performance of his duty bound him to return the plaintiff's letters to plaintiff if they were not delivered to the persons addressed.

A postmaster is immune from liability to mail-users where he acts *within* an authority conferred upon him, but when he steps *outside* the authority conferred upon him he becomes a tort feasor.

Literary Recreations, Limited, vs. Saure (B. C., 1932), 4 D. L. R. 553, 3 W. W. R. 423, 58 Can. C. C. 385.

In the cited case, a Postmaster General and his subordinate claimed immunity from suit at the hands of a mail-user on the ground that they were responsible only to the Crown and Parliament. Mr. Justice M. A. Macdonald replied:

> "If we had no statute limiting authority and the act complained of was a political act of state performed pursuant to sovereign authority other considerations would arise. Where, however, authority is defined by statute or by a commission, we must look in that quarter for justification for the act attempted or performed. Even if acting for the Crown, the agent would be responsible for tortious acts. He might be indemnified but the right to compensation by the party injured is beyond question. * * *
>
> "To hold otherwise would be to seriously interfere with the rights and liberty of the subject."

From *United States vs. Perkins* (C. C. A. 8), 280 Fed. 546, 549:

> "Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done *virtute officii*. The bond providing only for the faithful discharge of the principal of his official duties, the condition of the bond is considered to have been broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does [not?] involve the exercise of discretion, and, where the duty

which has not been faithfully discharged was owing to the person injured, such person may sue on the bond. By the weight of authority, acts done by color of office are regarded as acts for which sureties on official [bonds] are liable. * * * The acts here complained of fall within this category, and particularly so in view of the charge that they were done with wrongful intent and purpose."

A position adopted by the surety in its brief before the Circuit Court of Appeals impels us to anticipate a possible renewal of the contention in this Court. It was claimed below that the Government, "the obligee named in the bond, after due inquiry, determined that no default existed under it," and subsequently elevated defendant Malone from acting postmaster to postmaster; and that "Malone's conduct of his official duties has been fully ratified and affirmed," etc. Nothing in the Record can be cited, in support of these contentions by the surety, excepting the bare reference, incidentally made by the trial judge in another connection, concerning "a new bond obtained when Malone was elevated from Acting Postmaster to Postmaster" (R. 84).

So far as the surety may argue that the Government's postal inspector or other administrative officers have found that the Government has sustained no loss through the postmaster's misconduct; that, therefore, it has no claim on the bond in suit; and that it has no right or duty to sue on the bond on plaintiff's behalf, those considerations strengthen our right to sue, as hereinafter shown. But the contentions seem to go farther than that by seeking to deny relief to plaintiff on a theory that the Government's postal administrative officers have "whitewashed" the postmaster under such circumstances as to nullify the jury's findings mentioned by the trial judge concerning the postmaster's mis-

conduct and the damage proximately resulting to plaintiff therefrom. To such possible argument we answer:

(1) There are no such exceptions or appeal before this Court by defendants as to permit a review of the fact findings set forth by the trial judge.

(2) There is nothing in the Record to show that the merits of the postmaster's acts have been the subject of departmental inquiry, "due" or otherwise, nor that "the conduct of his official duties has been fully ratified and affirmed," excepting as an inference may be drawn from the mere fact of his securing a new commission as postmaster.

(3) There is no showing that, if the Department investigated the postmaster's acts in handling the plaintiff's mail at all, the investigation was conducted with the thoroughness that characterized the trial of this case before a jury.

(4) Obviously, whatever may be the force of inferences to be drawn from Malone's elevation to full-fledged postmastership after the misconduct found by the jury to have been committed by him, the inferences are impotent so far as detracting from the jury's findings. There is no ground for a claim that the Department had jurisdiction to foreclose plaintiff's appeal to the courts on the question of whether or not Malone was guilty of misconduct as acting postmaster, nor for a claim that plaintiff was made a party to an investigation by the Department or given any opportunity to present the facts without which no efficient investigation could proceed.

This Court has decided that the Government's retention of a postmaster after knowing that he has embezzled funds does not discharge his surety from liability on a later embezzlement. (*Jones vs. United States*, 18 Wall. 662.)

VII.

The SPIRIT, as Well as the Letter, of the Statute Requires That a Postmaster's Bond Be Deemed to Cover Mail-Users' Losses, as Well as Losses of the Government.

(See Assignment of Error No. 4.)

The letter of the law is so clearly and unambiguously expressed that it and the spirit of the law should be deemed to be identical.

The postmaster's bond statute falls squarely within the rule that the letter of an unambiguous law is not to be disregarded on the pretext of pursuing its spirit.

Crooks vs. Harrelson, 282 U. S. 55, 75 L. Ed. 156.

It is not denied by the defendants or by the courts below that the *letter* of 39 *U. S. C. A.*, Sec. 34, prescribing the coverage of a postmaster's bond, includes duties owing by postmasters to mail-users. It is merely claimed that the coverage is limited to the Government's interests, because the bond runs to the United States and because there are collateral statutes and department regulations which, it is claimed, evince a purpose to protect the Government alone. The surety regards as unnatural any thought that the Government would be so altruistic as to protect the people for whose benefit, primarily, the postal service exists.

That, in exacting a bond from postmasters, the Government has *power* to exact one that is broad enough to protect its citizens—the protection of whom is the only purpose for which the Government exists—is undenied and undeniable.

When we couple to that power the idea that reasons why the Government *should* protect postal patrons are as strong as if not stronger than the reasons why it should protect

itself, in dealings with postmasters, then does it not necessarily follow that the statute requiring a bond should be scrutinized and interpreted with a view to finding in it legal intendment that the Government has exercised that power and discharged that duty? No consideration can warrant stretching the words of a statute to mean that the Government, trustee for the people, has sought to protect itself only, and to leave the people, the beneficiaries of the trust, without the same protection. If the words are to be stretched, it should be for the purpose of accomplishing the justice that can only be accomplished through protecting both the Government and postal patrons.

But it is not necessary to stretch the language of the statute in question. The statute requires that the bond be conditioned, and the bond is conditioned, for faithful performance of *all* of the postmaster's duties imposed on him by law *or* regulations. And, as the Circuit Court of Appeals itself observed in *Howard vs. United States*, 102 Fed. 77, it is only by an unwarranted reading into such a bond of words not there that the bond can be made to read that it is for the benefit of the Government alone.

From *Grady vs. United States* (C. C. A. 8), 98 Fed. 238, 240, an action on a postmaster's bond for embezzlement of money-order funds:

> "As the bond specially provides that the principal shall comply with all of the duties and trusts imposed on him either by law or the rules and regulations of the post-office department, the liability of the sureties is not only within the spirit, but the letter, of the bond."

The Circuit Court of Appeals cited the *Grady Case* in support of its conclusions in the *Howard Case*.

The Circuit Court of Appeals does not seem to give effect

to the surety's contention that an interpretation of the postmaster's bond statute is controlled by the mere fact that it provides for a bond running to the Government. Nor does the Court support the surety's argument that we should be denied relief because in some other case a bond might prove insufficient to cover claims of both the Government and private mail-users. Nor does the Court seem to deny that the letter of the statute covers both. The Court reached its conclusion by placing in one scale of a balance: (1) The letter of the statute, conferring benefits on both the Government and mail-users. (2) Postal regulations relating to safe conduct of the mail. (3) A conception that "the principal purpose of the postal system is to transmit private mail;" and by placing in the other scale a conception "that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection." The Court finds that this conception outweighs the three considerations in the first scale (R. 106; 103 Fed. (2d) 452).

In Subdivision VII (c) of this brief, we have attempted to answer this position, noting that the lower court overlooked many federal statutes that are plainly designed for the benefit of mail-users. We have, also, attempted to demonstrate a preponderating solicitude of Congress for the protection of the right of mail-users to faithful handling of their letters, etc. There remain to be considered a few points bearing on the spirit of the statute.

VII (a).

The Spirit of the Law Is Found in the Consideration That Congress Has Enacted What It Should Have Enacted for the Benefit of Mail-Users.

(See Assignment of Error No. 4.)

> "It is the duty of the United States to protect the public against its own officers, even to the extent of enforcing every legal right which it possesses, whether criminal or civil."
>
> *United States vs. Grisscold*, 8 Ariz. 453, 458.

The last quoted statement was made with specific application to the rights of users of the mail on postmasters' bonds.

In *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039, the Court distinguished between reasons supporting an action on a postmaster's bond by a user of the mails and the lack of reasons to support an action by a postmaster on his deputy's bond. This distinction was drawn in holding that the United States, as obligee of a deputy postmaster's bond, could not recover from the surety for the benefit of the postmaster who voluntarily made good the deputy's shortage. In referring to *United States Fidelity & Guaranty Co. vs. United States* (C. C. A. 9), 246 Fed. 433, and particularly to certain postal regulations mentioned in that case, the court said (pp. 1040-1041):

> "There is a basis, in fact, which probably accounts for the regulations and statute, above referred to, protecting the users of the mail, but this protection should not extend to a third party like a postmaster. One using the mail has no voice in the appointment of the post office force, and no control over the handling of the mail received by the department. The postmaster, on the other

hand, is not so handicapped. He can exact a bond from the deputy to protect himself. He may cause the deputy's removal, and he may personally prevent defaults or misuse of funds. *The user of the mails can do nothing but deliver his mail to the post office.*" (Italics supplied.)

"All these advantages the law provides for the security of the subject, in consideration of their being obliged to send their letters by this mode of conveyance."

Lord Mansfield, in *Whitfield vs. Despencer* (K. B.), 2 Cowper 754.

Concerning a county auditor's bond for faithful discharge of his duties it was said in *National Bank of Redemption vs. Rutledge* (C. C., N. D., Ohio), 84 Fed. 400, 407-408:

"Under such language as we have in this bond, and under the description in the statutes of the duties that are required of an auditor of the state of Ohio, it seems to me that it is placing an entirely unjustifiable and strained construction upon the language used to confine the obligation to the protection of the people of the county and the taxpayers and the funds in hand in their dealings with the auditor. *The public at large, under any well-regulated and intelligent public policy, should be protected in their dealings with the county as much as the county itself in its corporate interest in the business that is done.*" (Italics supplied.)

VII (b).

The Spirit of the Bond Statute Is Found in the Purpose for Which the Postal Service Primarily Exists—the Convenience and Needs of the People in Their Private Affairs.

(See Assignment of Error No. 4.)

The history of our postal system does not justify the conclusion reached by the Circuit Court of Appeals, that Congress intended, primarily, to secure the Government in "its fiscal and other relations with the numerous postal employees over the country," when it exacted a bond for the faithful discharge of *all* of a postmaster's duties.

The provision in the Constitution, Art. I, Sec. 8: "Congress shall have power: * * * To establish post-offices and post roads," should not be dissociated from the Colonial conception of a system operated for the benefit of the people. Our postal system did not really originate with the Constitution; its beginning is found in the British postal service—not as a copy of the British system, but as a Colonial branch. Essentially, the same system was carried over through the Confederation and into the Union. So, the framers of the Constitution reasonably may be assumed to have contemplated continuation of a system designed primarily for the benefit of the people. The Union was formed to increase the rights of the people individually rather than to surrender those previously possessed by them. They were used to a system under which the responsibility of postmasters to them had long been recognized, and Congress should not be deemed to have ignored that responsibility when it required postmasters to furnish bonds for faithful performance of all of their official duties.

When the people themselves, through the Constitution, transferred to the Government as a monopoly the transmis-

sion of mail, they must have been actuated by a belief that this would enhance the integrity of the mails. It would be unreasonable to assume that the people contemplated the surrender of any advantage enjoyed by them under the old system of private carriage of mail. Had transmission of the mails remained a private enterprise, the sender of a mishandled letter would have had causes of action against the carrier and his employees under the law of bailments. The people may be deemed to have contemplated that the Government itself would not be liable for mishandling of mail, excepting as Congress might so provide. But they had a right to expect that Congress would at least provide some efficient and adequate means whereby users of the mails could secure private redress for private wrongs committed by postmasters under color of their public office.

Congress has not disappointed these natural expectations of the people. Congress itself, by express statutes that bind the Post Office Department from top to bottom, has taken measures to guard against interference with the flow of legitimate correspondence. These statutes prescribe that letters shall be either delivered to the addressees or returned to the sender. The statutes prescribe duties which Congress has deemed so fundamentally important that not even the Postmaster General is left with any power of discretion to relax requirement for their performance.

History of the Postal System.

The following brief history of the postal service will serve to show how the system has been developed contemporaneously on both sides of the Atlantic as an institution for the primary benefit of the people in their private capacities. Except as otherwise noted, the facts have been taken from

"*History of the British Post Office*," by J. C. Hemmeon (Harvard Economic Studies, 1912).

Originally the English post office was established to serve the royal household; other private letters were carried, if at all, without revenue (p. 12).

In 1633 the post was reorganized as a source of revenue, and the post offices were farmed out.

During the eighteenth century, postage rates greatly increased, and stricter economy was enforced in the post office, to serve the nation's need for a larger revenue (p. 49).

Commencing with 1840, the principle of using the post office as an instrument of taxation was abandoned in favor of the view that it was primarily established for the benefit of trade and commerce. In 1840 an act was passed establishing penny postage for the United Kingdom.

The first Colonial post office appears to have been established in 1639 for the Massachusetts Bay Colony for foreign mail only. In 1672 mail service was established from New York to Connecticut and Massachusetts Bay Colony appointed a postmaster.

In 1688, letter offices were ordered established in the North American colonies. In 1691, a patent was granted to one Neale to establish post offices there. The Colony of Massachusetts appointed one Hamilton Postmaster General. The division of authority was corrected by Neale appointing Hamilton his deputy. A regular weekly post was established between Boston and New York and New York to New Castle, Pa. Hamilton was in Boston and postmasters were appointed in New York and Philadelphia (pp. 32-33).

In 1737, Benjamin Franklin was appointed postmaster in Philadelphia. In 1753, he was appointed postmaster for the Colonies, and dismissed from office in 1774.

July 26, 1775, the Continental Congress appointed Franklin postmaster and established the postal system. Franklin held office until November 7, 1776, when he went to France.

Articles of Confederation, Art. IX, gave Congress the "sole and exclusive right and power of * * * establishing and regulating post offices from one state to another, throughout all the United States, and exacting such postage on the papers passing thro' the same *as may be requisite to defray the expenses of the said office.*" (Italics supplied.)

The original draft of the provision in Constitution, Art. 1, Sec. 8, empowering Congress to "establish post offices and post roads," omitted reference to post roads. "Post roads" was added by a vote of five to four. "*Formation of the Union*," p. 556. (Government Printing Office, 1927.)

The post office, under the Constitution, was established by an act adopted May 8, 1794. 1 *Stat. at L.*, p. 357.

A concise history of the development of the postal service in this country appears in *Hoover vs. McChesney* (C. C., Ky.), 81 Fed. 472, 477. There it is noted how the power given Congress over the postal service had "become an indispensable part of the social and commercial life of the nation." The court quoted 3 *Story, Const.*, Sec. 1120, on this point, and then showed how the postal service had been so developed as to foster *business interests*, as well as social and political contacts.

For a more detailed history of the postal service, traced from its beginning in the Colonial days as a branch of the British system, through the Confederation, and down to its establishment by our Government, after the British pattern, see *United States vs. Kochersperger* (C. C., E. D., Pa.), 29 Fed. Case No. 15,541.

Principal Purpose of System.

For a brief and interesting discussion of the development of the postal service as a governmental agency, see 1 *Chitty's Blackstone* (1842 Ed.), 239-247. It was there observed of the postal system, viewed as an institution to raise public revenue and also to serve the public:

> "There cannot be devised a more eligible method than this of raising money upon the subject; for therein *both the government and the people find mutual benefit.* The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed." (Italics supplied.)

Here we find a recognition of a "partnership" between the Government and the people—a consideration in itself sufficient to show that a postmaster's bond faithfully to discharge *all* of his duties should be deemed to secure both members of the partnership.

But the interest of private mail-users in the faithful transmission of mail has become a preponderating factor since the last quoted commentary was written. As shown by the historical outline presented above, the postal service was abandoned as an instrument of taxation a century ago, and it is a matter of common knowledge, we believe, that the service exists now primarily as a safe and convenient means of communication between people in their private social and business affairs.

Except for its use by private persons, it is inconceivable that the Government would maintain a postal service. Undoubtedly, its official communications would be sent by privately owned carriers, just as the Government now utilizes privately owned companies for the transmission of telephonic

and telegraphic messages. It is specially inconceivable that post offices would exist in any of the thousands of villages and small towns—to which class belongs Montgomery, Minnesota (population, 1930 census: 1,570)—were it not for the needs and convenience of private mail-users.

In *Howard vs. United States*, 184 U. S. 676, this Court held that the bond of a Federal District Court clerk, for the faithful discharge of *all* of his duties, protected the relatively small number of people who within a lifetime have occasion to deal with such officials. Practically every person in the country who is able to read and write is a frequent user of the mails. Does not that consideration suggest a much stronger reason for according to mail-users security against the torts of postmasters, where a similarly worded bond is given?

> "Now, our whole economic, social and political system has become so dependent upon free and *secure postal communications*, that the attempt to measure its specific effects can be little less than a waste of words."
>
> *Encyclopedia Political Science*, Vol. III, p. 310, article on "Post Offices" by Pres. Arthur T. Hadley.

In *Public Clearing House vs. Coyne*, 194 U. S. 497, 506, this Court said:

> "The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years, the transmission of private letters was either intrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times, and was recognized in the Constitution and in some of the earliest

acts of Congress, the rates of postage were so high, and the methods of transmission so slow and uncertain, that it was not until 1845, when the postage was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses.

"It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty, and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function, assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress."

In re Jackson, 96 U. S. (6 Otto) 727, this Court said:

"The power vested in Congress 'To establish post offices and post roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and *all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.* * * * The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations* as to what shall constitute mail matter, *but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.* * * * No law of Congress can place

in the hands of officials connected with the postal service any *authority to invade the secrecy of letters* and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." (Italics supplied.)

"The vigilance and care observed by the Government in the postal service is the inducement upon which people employ the mails. The security, both when the Government was under no legal liability, and now when it is under a limited legal liability, covers all known methods to prevent loss from negligence, accident, or dishonesty. The Government occupies the field of mail transportation to the exclusion of others, and invites the fullest possible use of its facilities, even in that portion of the field which other instrumentalities cover. The moral liability of the Government has always been an element in the situation, and has helped to strengthen the confidence with which people respond to the Government's invitation to use its facilities. Consequently, both when the Government was under no legal liability for loss, and now when its legal liability is restricted to $10 for each first-class [registered] piece, it has always investigated losses and sought to recover and restore to the owner the value lost, or as much thereof as possible. The Government limits its legal responsibility, but uses the utmost endeavor to find and restore a lost piece of mail, and if the loss is not caused by a casual disappearance or accident but is due to dishonesty and unfaithfulness, *compels restitution from the culprit and from those responsible for his faithful service.* I think there can be no doubt that this is and has been historically the Government's attitude, and that it is the necessary and right attitude." (Italics supplied.)

23 *Op. Atty. Gen.* (Hon. Philander C. Knox) 476, 478.

The Opinion of Attorney General Knox, just cited, was followed in *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019.

The Government's monopoly of the postal service rests, essentially, upon consideration of the best interests of private users of the mails. Those considerations were thus recognized in *Blackham vs. Gresham* (C. C., S. D., N. Y.), 16 Fed. 609, 612:

> "If private agencies can be established, the income of the Government may be so reduced that economy might demand a discontinuance of the system; and thus *the business which it is the right and duty of the Government to conduct for the interest of all*, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service."

To the same effect, see *United States vs. Hall* (C. C., E. D., Pa.), 26 Fed. Cas. No. 15,281.

> "Congress, of course, has ample power to protect the mails of the United States, and any letter which gets into them, from the time it is received by the postal authorities *until its possession is surrendered voluntarily and rightfully to the party entitled to receive it.*"
>
> *United States vs. Bullington* (C. C., N. D., Ala.), 170 Fed. 121.

In *Hoover vs. McChesney* (C. C., Ky.), 81 Fed. 472, 479, 481, it was decided that the right to use the mails is not "a mere privilege or gratuity which can be given or refused by those in charge of the postal service," but is in the nature of a *property right*, of which one cannot be deprived without due process of law. The Court said (p. 480):

"It is not to be overlooked that the establishment of the postal service * * * has become a part of the business operations of the citizens of the United States, and an *indispensable part in some kinds of business;* and that this right to the use of the mails by *sending* and receiving mail is a most valuable one to the citizens, and one *the depriving of which would destroy the business and the living of very many of the citizens* of the United States."

Although the cited case was decided by an inferior federal tribunal, the decision and the supporting reasoning scarcely needs approval of a higher tribunal. A check of the Federal Citations fails to disclose any case in which any other court has questioned the soundness of the cited decision, so far as its applicability to the case at bar is concerned.

A clear and concise summary of reasons why postal officers should be held liable to private mail-users for breach of statutory duty toward them appears in the opinion of Chief Justice Macdonald of the British Columbia Court of Appeal in *Literary Recreations, Limited, vs. Saure* (B. C., 1932), 4 D. L. R. 553, 3 W. W. 123, 58 Can. C. C. 38. That was an action in tort against the Postmaster General and a subordinate for excluding matter plaintiff attempted to send through the mail. The action was dismissed only because the Postmaster General was found to have acted within a discretion vested in him by statute. Reasoning why postal officials should be held accountable to private mail-users, Chief Justice Macdonald said:

"The *Post Office Act* was enacted by the Dominion Parliament for the benefit of the public. It is true that it was not bound to pass a *Post Office Act*, but having done so those who use the post office, I think, have the

right to expect that it will be conducted in a way which will not unreasonably interfere with the rights of those who use it. The principle I think is the same as that which governs companies such as railway companies who while not bound to furnish all conveniences for their passengers yet if they do furnish one they are bound to use it in such a way as not to injure their passengers. The post office is in reality a public utility erected for the convenience of the public at their expense, thereby giving those who use it the right to demand immunity from torts such as the one which was alleged to have been committed here."

If post offices were operated as a municipal enterprise, it is not to be doubted that cities would be liable to mail users for such tort as was committed by the postmaster in this case. The same reasons that make cities subject to the liabilities and responsibilities in the operations of such public utilities as waterworks and electric plants, would make them liable for torts committed in the operation of a municipal post office.

"* * * A municipal corporation engaged in the business of supplying water to its inhabitants for its own corporate benefit or profit is performing a private or corporate function, although a profit is not in fact made, and is liable for negligence in the performance of such enterprise, in the same manner as a private corporation or individual would be."

43 *C. J.* 1177, Sec. 1948.

The same rule applies to electric or power plants (43 *C. J.* 1184, Sec. 1950) and gas plants (43 *C. J.* 1182, Sec. 1951).

VII (c).

A Postmaster's Principal Duties Run to Users of the Mails, Not to the Government.

(See Assignment of Error No. 4.)

The Circuit Court of Appeals says that the "related statutes and postal regulations" do not support an inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452). We respectfully submit that the lower court erred in reaching that conclusion—through overlooking important statutes and regulations designed by Congress for the special benefit of mail-users.

The Circuit Court of Appeals specifically refers to but two related statutes, 5 *U. S. C. A.*, Sec. 377, and 28 *U. S. C. A.*, Sec. 732.

Sec. 377 merely requires that the bond run to the United States of America. Under another heading in this brief—Subd. III (b)—we draw attention to the doctrine of *Howard vs. United States*, 184 U. S. 676, and numerous other cases, that the mere fact that the United States is required to be named as obligee of a bond does not exclude coverage of the bond for the benefit of private persons.

Sec. 732 deals only with *remedies*. At most, it merely requires that certain actions be brought "*in the name of the United States.*" The effect of this section is discussed hereinafter in connection with the plaintiff's right to sue in the name of the United States. (See Subd. IX (a).)

Judge Nordbye, the trial judge, in his opinion (R. 75-76), refers to:

39 *U. S. C. A.*, Sec. 35, providing for the approval of postmasters' bonds by the Post Office Department.

39 *U. S. C. A.*, Sec. 36, permitting payments made by a postmaster, after giving a new bond, to be applied to discharge of obligations arising under the old bond.

39 *U. S. C. A.*, Sec. 37, providing for notice to the surety when the postmaster is short in his accounts.

39 *U. S. C. A.*, Sec. 38, making a postmaster liable on his "bond for the safe-keeping of the public property of the post office, *and the due performance of the duties thereof*," until his commission expires, etc.; and providing for termination of the surety's liability on notice where there is prolonged delay in filling a vacancy. (Italics supplied.) (We assert that this section merely makes clear the intended duration of the bond required by Sec. 34.)

39 *U. S. C. A.*, Sec. 40, prescribing a three-year limitation on suits by the United States where the *settlement of a postmaster's account* shows that he is *indebted* to the Government.

39 *U. S. C. A.*, Sec. 44, prescribing penalties against the postmaster and his surety for neglect to render accounts.

The surety's brief in the Circuit Court of Appeals, in addition to citing some of the statutes above mentioned, cited:

5 *U. S. C. A.*, Sec. 22, authorizing the Departments to adopt regulations not inconsistent with law.

5 *U. S. C. A.*, Sec. 392, empowering the Postmaster General to settle claims against the *United States*, for *damage done to person or property* in the operation of the postal service, *where the award does not exceed $500*.

39 *U. S. C. A.*, Sec. 790, providing for delivery by the Postmaster General of stolen property, or its proceeds, to the owner *when the same comes into the hands of the Department*.

31 *U. S. C. A.*, Sec. 215, providing for settlement of claims *against the United States for not more than $1,000*, "on ac-

count of damages to or loss of privately owned property," caused by *negligence* of any Government officer or employee. (This statute is not limited to the postal service.)

5 *U. S. C. A.*, Sec. 306, requiring the Attorney General to appear *on behalf of the United States* in this Court and in the Court of Claims when the United States or an officer is a party or interested. (The Attorney General has specifically ruled that this is not an action in which he properly may appear—R. 58-59.)

5 *U. S. C. A.*, Sec. 317, giving the Attorney General superintendence over District Attorneys.

5 *U. S. C. A.*, Sec. 485, requiring District Attorneys to prosecute actions in which the United States are concerned.

We believe that the foregoing lists include every federal statute that has been cited in this case to support a view that Congress did not intend that private mail-users should have a right against a postmaster and his surety on a bond given for the faithful discharge of all of the duties imposed on him by law.

It will be noted that the lists are singularly lacking in references to *statutes that impose duties on postmasters.*

Below we summarize statutes which impose duties and responsibilities upon postmasters for the obvious benefit of mail-users:

39 *U. S. C. A.*, Sec. 4, requiring every postmaster to keep an office for "receiving, delivering, making up, and forwarding all mail matter received thereat."

39 *U. S. C. A.*, Sec. 7, requiring postmasters to post in a conspicuous place in the office a schedule of mail arrivals and departures.

39 *U. S. C. A.*, Sec. 401, providing for advertising undelivered letters.

39 *U. S. C. A.*, Secs. 406-410, requiring undeliverable let-

ters to be returned to the sender or sent to dead letter office for identification of the sender.

39 *U. S. C. A.*, Sec. 409. "When the writer of any letter on which the postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, *shall* be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter." (Italics supplied.)

18 *U. S. C. A.*, Sec. 315, making it a felony to embezzle a letter or to divert it from the addressee with design to obstruct correspondence.

18 *U. S. C. A.*, Sec. 318, making it a felony for a postmaster unlawfully to detain, delay, embezzle or destroy a letter.

18 *U. S. C. A.*, Sec. 324, making it an offense knowingly to obstruct or retard the mail.

39 *U. S. C. A.*, Sec. 256, forbidding the opening of nonmailable letters by any person other than an employee of the dead-letter office.

For pertinent regulations of the Department, designed for the protection of mail-users, see the list compiled under the head, "Departmental Regulations Involved," in our Statement of the Case.

When Congress enacted 39 *U. S. C. A.*, Sec. 34, requiring a postmaster to give bond for the "faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department," Congress could not have foreseen just what duties might be imposed by departmental regulations. But Congress must have had in mind that it was requiring a bond for the faithful performance of the specific duties enjoined by itself upon postmasters. And Congress must have had in mind the faithful performance

of duties arising under regulations designed to effectuate the intention of Congress that there be no unwarranted interference with private correspondence.

That the principal duties of a postmaster center about the handling of mail is shown by 39 *U. S. C. A.*, Sec. 4, which provides that "every postmaster shall keep an office * * * for the purpose of receiving, *delivering*, making up, and forwarding all mail matter received thereat." (Italics supplied.)

Congressional intention that the postal service shall be operated primarily for the benefit of private mail-users is further attested by 39 *U. S. C. A.*, Sec. 158, which provides: "The Postmaster General, *when the public convenience requires it*, may establish within any post-office delivery one or more branch offices for the receipt and delivery of mail matter and the sale of stamps and envelopes." (Italics supplied.)

In a case reported by Sir Wm. Blackstone—*Rowning vs. Goodchild*, 2 W. Bl. 906, 3 Wils. 443, 5 Burr. 2716—the Court referred to an English statute resembling Sec. 4, *supra*, in support of its decision that a postmaster was liable for failing to deliver letters to an addressee at the addressee's place of abode. Emphasizing the importance of *delivery*, the famous reporter italicized that word in noting that the English postal act imposed upon postmasters the duty of "receiving, dispatching, sending, and *delivering* all letters and packets whatsoever." The Court referred to several other statutes, resembling those above summarized, designed to insure prompt delivery or return of letters. Referring to deputy postmasters, who discharged the same duties as our postmasters, the Court said:

> "* * * We think that, in all cases, deputies are answerable for their own personal misfeasance, such as detaining the letters in question; and in the present case

the deputies are made by the act of Parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such. And it is fitter for the subject to resort to them for satisfaction for injuries done by themselves, than to their principals"—the Postmaster General.

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, 249, the Court said:

"It is the duty of the Post Office Department to deliver mail in so far as it is possible to the individual, firm, or corporation for whom it is intended."

Not even the Postmaster General could have legalized the postmaster's misdelivery of plaintiff's mail. In *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 109, this Court said concerning the Postmaster General's powers:

"His right to exclude letters, *or to refuse to permit their delivery to persons addressed*, must depend upon *some law of Congress*, and if no such law exists, then *he cannot* exclude or *refuse to deliver* them." (Italics supplied.)

Because the right of a mail-user to have his matter *delivered* to the addressees is more important than the right to have it *carried* through the mails, what was said in *Payne vs. Railway Pub. Co.*, 20 App. D. C. 581, 598, is in point:

"The citizen who desires to have his publication carried in the mails * * * and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired *a positive legal right to have it so carried*, and his right will be enforced by mandamus," etc.

No aura of immunity from liability for wrongful conduct

surrounds a postal officer or employee. When a mail-coach driver was indicted at Old Bailey for manslaughter, by running over the decedent, it was urged in his defense that his contract with the Post Office compelled him to drive at a speed of nine miles per hour. Lord Ellenborough instructed the jury that neither the defendant's public contract nor considerations of public convenience justified endangering the lives of His Majesty's subjects. The defendant was convicted.

The Rose, 2 Wm. Rob. 1, 166 E. R. 656.

When a postmaster receives for the Government a stated sum for the transmission of a business letter, and then receives the letter, there is a legitimate assumption that the letter is of more importance to the sender or the addressee than the amount of postage paid; otherwise, presumably, the letter would not be sent. So, in every such transaction the mail-user has an interest that is at least equal if not paramount to that of the Government. The Government is concerned in receiving the pennies that have been collected by the postmaster as postage, and the sender of the letter is interested in having the letter either delivered to the addressee or returned to him. Why should not the mail-user be protected as well as the Government, against the postmaster's failure to discharge his duty? The Government can exercise caution to choose as postmasters those who may be depended upon properly to discharge their duties. "The user of the mails can do nothing but deliver his mail to the post office." *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039.)

The complaint averred a loss of $34,997.03, resulting from the postmaster's breach of duty (R. 18). The jury returned a verdict for the full penalty of the bond; $16,000 (R. 63).

Thus it appears that the plaintiff's actual loss is as great as the loss would have been to the Government if the postmaster had embezzled the receipts from the sales of more than 1,150,000 three-cent stamps.

So important did the New York Court of Appeals regard the protection of business letters against falling into unauthorized hands that it directed the appointment of a referee to receive letters addressed to a physician and to distribute them between the physician and a company to which he had sold his business.

Dr. David Kennedy Corp. vs. Kennedy, 165 N. Y. 353.

Modifying a judgment that directed that all mail addressed to the physician be delivered to the company, the Court of Appeals said:

> "In some cases this would work injustice to the defendant by allowing strangers to read letters of a confidential character that were intended only for him. At the same time it would be unjust to the plaintiff to allow the defendant to open and read letters intended only for it, and to discover the secrets of its business."

Judicial notice will serve to remind the Court of an almost endless list of situations in which delivery of letters to the addressees, or return of the same to the senders, is of vital importance to mail-users. Here are some examples:

Where a statute provides for substituted service of process by mail, or for the service by mail of notices or other papers in actions, etc.

Where creditors and other interested persons are notified of hearings, or of a time limit for filing claims, in proceedings involving the liquidation of the estates of decedents and insolvent persons.

Where owners are notified of hearings concerning the taxation, assessment or condemnation of property.

Where an advantageous offer to enter into a contract of employment or for the sale or purchase of goods or other property is dispatched.

Where a letter contains documentary evidence that a debtor has paid what he owes, or contains any other evidence bearing on a legal right.

Where, as in the case at bar, the sender of letters seeks information concerning the financial responsibility of persons to whom he is asked to extend credit.

We leave out of consideration the vast volume of social correspondence, where the faithful delivery of letters is of the greatest importance to the people—for example, letters concerning serious illness or death of persons—but involving situations in which it might not be possible or practicable to assess damages.

In *Hurley vs. Olcott*, 198 N. Y. 132, it was held that failure of an employer to receive a statutory notice of injury to an employee, mailed to the employer, did not vitiate the notice. The Court said:

> "In many cases the statute provides that notice may be served by mail. Such is the provision as to service of papers on the attorneys in an action, and it has been uniformly held that the service was effective when the papers were properly mailed, *regardless of their receipt by the adverse party. The risk of miscarriage is with the party to whom they are directed.*" (Italics supplied.)

From 46 *Corpus Juris* 599, Sec. 69:

> "However, by force of statute or by provision of contract, service may be effective when the notice is properly mailed, regardless of its receipt by the addressee."

One of the many reasons for holding a postmaster strictly responsible for faithful performance of his duties in handling letters, is the established rule of evidence, that proof of the mailing of a letter raises a presumption of its receipt by the addressee, especially where the envelope bears the return card of the sender. As shown in *Myers vs. Bibee Grocery Co.*, 148 Va. 282, the rule rests upon a presumption that the letter has been handled by the postal service in the course required by law.

From 1 *Wigmore on Evidence* (2d Ed.), Sec. 95:

> "The fixed methods and systematic operation of the Government's postal service have been long conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities."

See, also, 1 *Jones on Evidence* (4th Ed.), pp. 88-90, Sec. 52; and pp. 213-214, Sec. 123, note 18.

This Court said in *Rosenthal vs. Walker*, 111 U. S. 185, that, on proof of mailing a letter, "it is presumed, from the known course of business of the postoffice department, that it reached its destination at the regular time and was received by the person to whom it was addressed."

Where it was shown that a letter bore the sender's return card, it was said in *Hedden vs. Roberts*, 134 Mass. 38, 39:

> "It was the duty of the officers of the postal service to return the letter to the address upon the envelope (the postage being prepaid) if it was not delivered to the person to whom it was addressed, and there is the same inference of fact that they would do their duty in this respect as in forwarding and delivering letters addressed to a merchant at his place of business. U. S. Rev. Sts. Sec. 3939."

In *Jensen vs. McCorkell*, 154 Pa. 323, the Court said con-

cerning the weight of the presumption of receipt of a letter, as affected by proof that the letter bore a return card:

"So greatly, indeed, does that fact strengthen the presumption, that it becomes well-nigh conclusive."

In re Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. (N. S.) 372, the Court found, as a matter of fact, from mere evidence of the mailing of a letter, that the letter had been received in due course, although the addressee denied receipt.

VIII.

The Decision of the Circuit Court of Appeals Conflicts With a Settled Rule That the Government, as a Bailee, Can Recover on Similar Bonds for Theft of Registered Letters and the Like, Irrespective of the Government's Liability to the Mail-User.

(See Assignment of Error No. 9.)

Concerning its conclusions that Congress did not intend to confer a direct benefit on mail-users, and that the dominant purpose was to protect the United States, the Circuit Court of Appeals says:

"These conclusions are not inconsistent with those decisions in which the Government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, *even in the absence of the assertion of a claim by the sender or proof of loss to the Government other than the interference with its special property rights as a bailee.* In such cases the injury to its property right and the moral, and perhaps legal, obligation to refund the amount of the recovery to the mail-user are said to sustain a suit on the bond for the value of the lost property *irrespective of the fact that the Government may not be*

liable to the mail-user for that amount. National Surety Co. vs. United States, 8 Cir., 129 F. 70; *United States vs. American Surety Co.*, C. C. Ill., 155 F. 941; *United States vs. American Surety Co.*, 4 Cir., 163 F. 228; *Gibson vs. United States*, 1st Cir., 208 F. 534; *United States Fidelity & Guar. Co. vs. United States*, 9 Cir., 246 F. 433. Whether these authorities would sustain an action by the Government in this instance need not be determined. The indirect benefit to the plaintiff, if the Government may maintain such an action in its interest, does not justify the present suit. *United States vs. United States Lines Co.*, D. C. N. Y., 24 F. Supp. 427" (R. 106-107; 103 Fed. (2d) 452-453). (Italics supplied.)

First, we respectfully submit that the Circuit Court of Appeals here confuses remedial and substantive rights. (See our argument under Point I.) How can the Government hold a postmaster's surety liable for a loss not involving liability on its part to an owner of mail, unless the bond be read as being intended for the protection of mail-users? And if the loss is covered by the bond why cannot the injured person sue in the name of the United States, and thereby avoid the circuitous process of the Government suing and turning the recovery over to the owner, in the absence of a statute requiring the Government to sue? (See *Howard vs. United States*, 184 U. S. 676.)

And, if a bond for the faithful performance of *all* of a postmaster's duties covers duties to the Government in its capacity as *bailee* of mail, as to which it has no liability, or only a limited liability, to the sender, why does if not cover the postmaster's liability to the bailor—the sender?

So, if it be conceded that the Government as a bailee can recover on a postmaster's bond for the benefit of the bailor—the sender of a letter—without being liable to him, why

should the bailor be prevented from suing directly, in the name of the United States?

In *New Jersey Steam Navigation Co. vs. Boston Merchants Bank*, 6 How. 344, this Court said:

> "The cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuity of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been brought in the name of the agent."

> "The existence of the bailee's right to sue does not preclude maintenance of an action by the bailor."
>
> 8 *C. J. S.* 371, Sec. 56, Note 81.

Regardless of express statutory provision, the law accords to patrons of ordinary common carriers and bailees a right to recover for wrongs against the bailed property, committed by a third person. If the third person happens to be an officer or employee of the carrier or the bailee, the carrier or bailee may be held liable under the doctrine of *respondeat superior*. But the Government, as bailee or carrier of private mail, cannot be held liable under that doctrine. Except as it provides some species of special protection for users of the mail, postal patrons are left with no other redress than a claim against the guilty postmaster, or other official or employee.

The Government expresses its unwillingness to rely upon the personal financial responsibility of a postmaster to

respond to it for such losses as he may cause the Government through violation of his duties as prescribed by law and departmental regulations; it requires of him a bond to respond for such losses. This is so, even though the Government has unlimited power and discretion in selecting postmasters and might limit appointments to persons of high solvency. But, as noted in *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039, 1041: "The user of the mails can do nothing but deliver his mail to the post office."

That the United States can recover on a postmaster's bond the full loss sustained by the sender of a mishandled letter is the holding of the Arizona Supreme Court in *United States vs. Griswold*, 8 Ariz. 153, 76 Pac. 596. The fact that there a registered package was involved cannot defeat application of the following quoted reasoning of that Court to letters in general, so far as concerns application of the law of bailments:

> "The government, in accepting a registered package, becomes not only the bailee of the sender, but assumes a liability to its bailor by reason of the bailment. Even should we therefore construe the liability of the sureties in its strictest sense, the government, as a bailee, would have a right to recover to the extent of its special interest, which would be measured by the extent of its liability to the sender of the package. If the government, therefore, has a right to sue to recover the loss it sustains as a bailee, under the general doctrine above stated, its recovery cannot be confined to such special interest, but may cover the entire loss sustained both by it and its bailor. Not only so, but we think it is the duty of the United States to protect the public against its own officers, even to the extent of enforcing every legal right which it possesses, whether criminal or civil."

Proceeding upon an assumption that only the United States could sue on the bond, the Arizona court concluded that it was "the clear duty of the government to bring such action."

In *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, the Court recognized that, in undertaking to carry letters, in consideration for postal charges paid, the Government becomes a bailee of the letters for the senders, and, as such, entitled to sue a wrongdoer for disturbing the Government's possession as such bailee. (It is to be noted that the Court did not limit this holding to valuables that may be enclosed in letters, but repeatedly referred (pp. 73-74) to the bailment as including "the *letters and* their *contents.*")

If the Government, as bailee of letters, is covered by a carrier or postmaster's bond for discharge of his duties under rules and regulations intended to safeguard against tampering with the mail, how can the spirit of the bond be held to exclude responsibility to the bailor, the sender?

The tortious conduct of the postmaster in this case, in delivering letters to an unauthorized person, was fraught with much heavier loss for the sender of those letters than was the rifling of letters in the case last cited. Obviously, no sound distinction can be made under which it can be held that if a postmaster causes a sender a $1.00 loss by rifling a letter of its contents his surety is liable, but that the surety is not liable if the postmaster tortiously diverts letters into the hands of a third person, thereby directly causing loss that may run into hundreds or thousands of dollars.

The decision in the last cited case was followed in *United States Fidelity & Guaranty Co. vs. United States* (C. C. A. 8), 229 Fed. 397, and, also, in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, 537, *an action on a postmaster's bond.*

Decisions in cases where the Government has recovered on

bonds for misbandling of registered letters do not militate against our position, merely because the Government had obligated itself to indemnify the senders against losses, within certain limitations as to amount.

Where the Government sues on the bond of a postal clerk for breach of his duties by stealing letters, the fact that the Government is under no legal obligation to reimburse the sender does not defeat the suit. "The moral obligation to pay over to the bailors"—the senders—"would be sufficient to enable the bailee"—the Government—"to maintain the action."

United States vs. American Surety Co. (C. C., Md.), 161 Fed. 149.

In the last cited case, the surety unsuccessfully argued that because the letters stolen were not registered, the Government was under no obligation to the sender and therefore not entitled to recover on his behalf.

In reaching its conclusion, the Court followed *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, *supra*.

It is to be noted that an intimation of *legal* liability on the part of the Government to users of the mail, enforceable in the Court of Claims, where the Government recovers on a bond, was given in *Gibson vs. United States* (C. C. A. 1), 208 Fed. 534, 538.

In *United States vs. American Surety Co.* (C. C. A. 4), 163 Fed. 228, the Court held that where a postal clerk rifled letters he violated his bond, conditioned for faithful discharge of his duties, and that the Government could recover on the bond for losses of senders, although not liable to the senders. The Court said:

"With information in the possession of the prosecuting officers of the United States of this character con-

cerning the conduct of Hammel"—the clerk—it was their *duty* to bring a suit upon the bond, and, when such state of facts was shown to exist, we think *the law clearly contemplates that a breach should be declared which would entitle the United States to recover the amount of the bond*," etc. (Italics supplied.)

That there is a strong analogy between a case like the one at bar and authorities above cited is shown by the position adopted by the Circuit Court of Appeals in *Howard vs. United States* (C. C. A. 8), 102 Fed. 77, in holding that a Federal Court clerk's bond covers private litigants, and that a private litigant could sue in the name of the Government. In reaching that conclusion the Court said that it "fully concurred" in the views of trial judge, Judge Adams. And among those views the Court quoted the following:

> "When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a high moral and meritorious obligation to the loser in the nature of a responsibility for the act of misconduct of its agent, and one which the national Congress might regard as sufficient to move it to a private act for his relief." (*United States vs. Howard* (C. C., W. D., Mo.), 93 Fed. 719, 721.)

In *United States vs. United States Fidelity & Guaranty Co.* (8 C. A. 6), 247 Fed. 16, it was held that the amount that the Government had paid the owner of a registered package that had been pilfered by a postal employee did not limit the amount that the Government could recover on the employee's bond. The Court said that the Government would hold the excess recovery, "upon a trust for the benefit of its injured patron. This right of recovery is rested, *not only on the legal right of an ordinary*

bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon *the right of the United States, as parens patriae, and upon principles of public policy, in the performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employees.*" (247 Fed. 18.) (Italics supplied.)

It will be noted that the last cited case and resembling cases above cited all deal with the liability of *sureties* on bonds of the character here involved, and do not limit the remedy to an action by the Government in tort against the principal whose misconduct has caused the loss.

> "The responsibility of the United States, in good faith and good morals, does not control the legal liability of the surety company. That must be determined by a proper construction of the language of the contract, in the light of all the circumstances."
>
> 23 *Op. Atty. Gen.* (Hgn. Philander C. Knox) 476, 478.

A theory that a trusteeship relationship exists between the Government and patrons of its official agencies was distinctly recognized by this Court in *Howard vs. United States*, 184 U. S. 692. In connection with the holding that Congress had shown, by legal intendment, that private suitors, as well as the Government, were beneficiaries of a Federal Court clerk's bond, and therefore entitled to sue thereon, the Court said:

> "The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions."

As already noted, the Circuit Court of Appeals and other federal courts have applied the same theory of trusteeship.

in favor of senders of registered mail. And because trusteeship in the latter class of cases has been recognized without regard to the Government's liability to senders of such mail, does it not follow that there is a trusteeship in cases like that at bar, where there has been a mishandling of unregistered mail, in violation of duties imposed by the postal statutes and regulations?

If the Government be treated as a bailee of mail entrusted to it for transmission, with the right accorded bailees in general to sue a third person who wrongfully deals with the subject of bailment, or his surety, then must it not follow that the sender of a letter is the bailor, and therefore entitled to the same remedies against third parties as bailors in general?

"Assumpsit will lie at the suit of a bailor against a third party to enforce a contract entered into by such third party with the bailee in relation to the subject matter of the bailment."

8 *C. J. S.* 372, Sec. 56.

6 *C. J.* 1166, Sec. 173.

New Jersey Steam Nav. Co. vs. Boston Merchants Bank, 6 How. 344.

Taintor vs. Prendergast (N. Y.), 3 Hill 72, 38 Am. Dec. 618.

Beebee vs. Robert. (N. Y.), 12 Wend. 413, 27 Am. Dec. 132.

IX.

Plaintiff's Right to Sue in the Name of the United States Flows From Congressional Will or Intent That Mail-Users Shall Be Beneficiaries of the Bond, and From Omission by Congress to Prescribe Another and Exclusive Remedy.

(See Assignment of Error No. 5.)

As we read the opinion of the Circuit Court of Appeals, the Court's denial of our right to maintain this suit really rests upon the sole consideration that mail-users are not co-beneficiaries with the Government of a postmaster's bond.

The Circuit Court of Appeals refers to this Court's holding in *Howard vs. United States*, 184 U. S. 676, first, that a federal court clerk's bond is for the protection of both the Government and private suitors, and, second, that consent to sue in the name of the obligee, the United States, might be assumed to arise by legal intendment. The Court then presents its conception why a postmaster's bond should be deemed to *protect* the Government only. And the Court concludes:

> "The plaintiff's argument and authorities fall far short of establishing the proposition that the bond in suit was required for the *direct benefit* of private mail-users, *or* that a *legal intendment permitting them to sue* on the bond should be read into the statute" (R. 105-106; 103 Fed. (2d) 452). (Italics supplied.)

Assuming that the bond was required to protect mail-users as well as the Government, we find no reasoning in the opinion of the Circuit Court of Appeals that is inconsistent with our right to maintain this suit. In short, the Court appears to have decided the case against us on the ground that mail-users have no substantive rights under a

postmaster's bond. If that conclusion be sound, it follows, of course, that there could be no legal intendment permitting a mail-user—or even the Government—to sue for his loss. But, once it be determined that mail-users are co-beneficiaries with the Government under a postmaster's bond, our right to sue automatically follows, under the doctrine of *Howard vs. United States*, 184 U. S. 676, *unless there is some act of Congress that provides another and exclusive remedy.* So, it is our position that the decisive question on the remedial issue is: Has Congress prescribed a special and exclusive remedy applicable to cases of this kind?

In *Federal Surety Co. vs. Minneapolis Steel & Machinery Co.* (C. C. A. 8), 17 Fed. (2d) 242, the court below said (p. 244):

> "The right of the third person to maintain an action on the contract in his own name is in a sense remedial, but *the right to sue depends upon the substantive right of such third party under the contract.*" (Italics supplied.)

A view that this action cannot be maintained in its present form runs counter to the ruling of the Attorney General:

> *"This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client and can be asserted only by your client"* (R. 58-59).

Thus are we placed between the surety's contention that only the Government can sue on our behalf and the Government's assertion that we should sue on our own behalf.

In determining the form in which plaintiff should sue, we started from the base recognized by this Court in *How-*

ard vs. United States, 184 U. S. 676. Finding no statute or subsequent decision of this Court to prevent applying the *Howard Case* as a governing precedent, we brought the suit in the form there upheld.

When the *Howard Case* was before the Circuit Court of Appeals (*Howard vs. United States*, 102 Fed. 77), that Court said (p. 84):

> "The contention that the relator has no right to maintain this action in the name of the United States upon his relation is without merit. Under the reformed procedure, which prescribes that the real party in interest must be plaintiff, it has been held that a suit on a bond given for the security of the public generally, and in which the state or other public corporation is the obligee, may be brought in the name of the person beneficially interested in the particular suit. * * *
>
> "On this question we fully concur in the views of Judge Adams, who tried the case at the circuit. He said:
>
> "'It is held in the case of *Corporation of Washington vs. Young*, 10 Wheat. 406, 6 L. Ed. 352, that no person can be authorized to use the name of another without his assent, given in fact *or by legal intendment*. It is my opinion that in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interest of suitors in its courts, and *in requiring from such clerk a bond for the faithful discharge of such duties, the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct* of the clerk in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States government, ordained and established for the use and convenience of its people. The money intrusted to

its clerk is, in a large sense, money which the government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the government may not be subjected to a suit for its recovery, it clearly owes a high moral and meritorious obligation to the loser in the nature of a responsibility for the act of misconduct of its agent, and one which the national congress might regard as sufficient to move it to a private act for his relief." 93 Fed. 719.

"Moreover, if there was technical error in stating the name of the plaintiff, this court would not reverse the case for that reason, but would direct the substitution of the name of the proper plaintiff. *McDonald vs. Nebraska* (at present term), 101 Fed. 171, and cases cited." (Italics supplied.)

(In passing, we draw attention to the fact that the language last above italicized has a bearing upon our argument under Subd. IV, *supra*. It will be noted that the Court treats the phrase, "suitors *wronged by official misconduct*," as the equivalent of a *failure faithfully to discharge official duties*. We cite this in support of our position that, when Congress spoke in the latter part of the postmaster's bond statute (39 *U. S. C. A.*, Sec. 34) of a postmaster's liability for "*misconduct in office*," it manifested intent that the postmaster's secured liability for the *faithful discharge of all his duties* should be co-extensive with his tort liability.)

In affirming the decision of the Circuit Court of Appeals, this Court said:

"A further contention is that, even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress. * * *

"That case"—*Washington vs. Young*, 10 Wheat. 4
409—"undoubtedly is authority for the proposition th
generally speaking, an obligation taken under legisl
tive sanction cannot, in the absence of a statute so pr
viding, be put in suit in the name of the obligee, t
proprietor of the obligation, without his consent. B
it also sustains the proposition that *consent* may, und
some circumstances, be assumed to have been given
that is, *may arise by legal intendment.* * * * In so
opinion, Congress intended that the required bon
should protect private suitors as well as the Unite
States, and *therefore, no statute forbidding it, a privat
suitor may bring an action thereon for his benefit in th
name of the obligee, the United States.*" (Italics sup
plied.)

Howard vs. United States, 184 U. S. 676, 691-69

In *Johnson vs. United States* (C. C. A. 1), 163 Fed. 3
32, Mr. Justice Holmes, then on circuit, said:

"The Legislature has the power to decide what th
policy of the law shall be, and if it has intimated it
will, however indirectly, that will should be recognize
and obeyed."

Howard vs. United States, 184 U. S. 676, was followed i
State vs. Dahl, 150 Wis. 479, 135 N. W. 474, a suit on a stat
treasurer's bond to recover for nondelivery to the receive
of a loan and trust company of securities that had been de
posited in the treasury. The receiver sued in the name o
the State, on his own relation. Passing upon the merit
of a demurrer to the complaint, the Court said:

"The first proposition urged in support of the de
murrer is that the action is not brought by the proper
parties, but must be brought by the state itself, repre
sented by the Attorney General. This objection must
be overruled. The promise is made in form to the state

but, so far as this fund is concerned, it is entirely for the beneficial interest of third persons, and those *third persons must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions, not dependent upon the will of others who have no beneficial interest in the promise.* Such bonds running to the state or some public official as obligee, but securing the performance of duties owing only to individuals or classes of individuals, are quite frequent; and the general principle is that, in the absence of express statutory provision, it will be held that the statutory intent is to grant permission to the individual or class protected by the bond to use the name of the state, or official, as plaintiff in an action brought to recover for breach of such a duty. *Howard vs. U. S.*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. Unquestionably the Attorney General could bring the action without relator, and use the name of the state as plaintiff, because the state is, for this purpose, the trustee of an express trust (*State vs. Wettstein*, 64 Wis. 234, 25 N. W. 30); *but where, as here, the Attorney General has refused, as he doubtless properly may, to bring the action, because the state has no beneficial interest in it, there seems no good reason which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested.*" (Italics supplied.)

From *State of Maryland vs. Baldwin*, 112 U. S. 490:

"By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

As early as 1844, this Court recognized, in *McNutt vs. Bland*, 2 How. 9, that where a private person has a right to

recover on an official's bond, the precise form in which he sues is immaterial. There suit was brought on a sheriff's bond in the name of the governor for the persons aggrieved by breach of the bond, which was conditioned for faithful performance of official duties. After noting that the suit could have been brought by the claimants in their own names, this Court added:

> "We can perceive no sound reason for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the governor, who is a purely naked trustee for any party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity. • • •"

In *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 108, where this Court recognized the right of an addressee of mail to enjoin a wrongful detention of the same by defendant postmaster, it was said:

> "That the conduct of a postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action of the head, or any one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.*" (Italics supplied.)

Finding that no statute sanctioned the detention of plaintiff's mail, this Court decided:

> "* * * The courts, therefore, must have power in a proper proceeding to grant relief. *Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.*" (Italics supplied.)

In *United States, to use of Kinney, vs. Bell* (C. C. A. 3), 135 Fed. 336, an action on a federal circuit court clerk's bond, the Court approved the form in which the suit was brought, as to plaintiff, saying:

> "Although the United States is here the nominal plaintiff, the action was really brought and has been prosecuted by the use plaintiff, Kinney, to recover for an alleged injury sustained by him by reason of the clerk's refusal to issue a summons and file the papers aforementioned."

In *Literary Recreations, Limited, vs. Sauve* (B. C., 1932), 4 D. L. R. 553, 3 W. W. 123, 58 Can. C. C. 385, an action against a Postmaster General and his subordinate for excluding plaintiff's matter from the mails, plaintiff's right to sue was challenged on the ground that while the post office affords public facilities, the privilege is a revocable concession from the Government; that respondents were responsible only to the Crown; that the Attorney General should have been made a party; that the matter involved the performance of an act of State, thereby making a petition of right the only available remedy, if any remedy existed at

all. To these contentions Mr. Justice M. A. Macdonald replied:

> "If the right to use a commercial agency maintained by the public for many years is denied to a citizen a legal right is invaded."
>
> It was a fallacy to treat respondents as if they were the Crown or acting under the authority of the Crown. "Respondents act under the authority of a statute."
>
> "Unless the act complained of, viz., prohibition of the use of the mails, can be justified by the statute respondents are liable in damages as two individuals who stepped outside the ambit of their official duties to commit a tort, one for ordering the commission of the act, the other for implementing it. The interests of the Crown are not affected; nor the public revenues placed in jeopardy and it is not necessary that the Attorney General should be a party. We are not concerned with a high officer of state from or through whom appellant seeks to recover moneys under public control. It follows that the procedure is not by petition of right."

That the right of the United States to sue on an official bond for the benefit of private parties who have sustained a loss is not to be deemed to exclude the right of a private party to sue in his own name or in the name of the United States for his own use is established both by reasoning and authority.

United States vs. Abeel (C. C. A. 5), 174 Fed. 12, is on all fours with *Howard vs. United States*, 184 U. S. 676, which it followed, in the respect that another federal court clerk's bond was held liable for money that he misappropriated and that belonged to private parties. The two cases differed only in the fact that in the *Abeel Case* the United States itself sued on the bond, whereas in the *Howard Case* the action was brought by the aggrieved private party on

the relation of the United States. Reversing judgment ordered in favor of the sureties, the Circuit Court of Appeals said (pp. 17-19):

> "It is not denied that if the fund so received" by the clerk and misappropriated by him "had been the property of the United States, due to the government primarily and not to others, this action could be maintained; *nor is it denied that any one of the officers or witnesses who earned and to whom was due a part of such sum could maintain an action on the bond in the name of the United States for his use for the sum so due him.* * * *
>
> "*Unquestionably one entitled to a part of the fund in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. Howard vs. United States, supra.* But it by no means follows that on the facts stated in the petition a suit cannot be maintained by the United States without a statement that the suit is for the use of someone named in the petition." (Italics supplied.)

Another case in which right to sue in the name of the United States was held to be an alternative remedy to a suit by the Government itself is *Bosler vs. United States* (C. C. A. 8), 26 Fed. (2d) 4. There the action was on the bond of a depository in bankruptcy given to the United States under 11 U. S. C., A., Sec. 101, as that statute was worded prior to its amendment June 22, 1938. The Court said (p. 8):

> "In view of the foregoing considerations, our conclusion is that the suit was properly brought in the name of the United States. *In this holding, however, we do not mean to be understood as deciding that the suit might not be brought by one or more of the creditors in the name of the United States.* See *Howard vs. United States*, 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed.

754; *United States vs. Abeel, supra*, page 19." (Italics supplied.)

Where a policy, indemnifying insured against liability for negligently operating an automobile, was found to have been so worded as to be for the benefit of third persons, the Circuit Court of Appeals, Fifth Circuit, said:

> "The policy nowhere provides that an injured person may not sue the insurer to enforce his judgment" against insured. "The conclusion is inescapable, as it seems to us, that appellant's policy confers a benefit upon an injured person who recovers a judgment against the assured in an action for damages coming within its provisions."
>
> *Ohio Casualty Ins. Co. vs. Beckwith* (C. C. A. 5), 74 Fed. (2d) 75, 78.

> "The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, *although the public body is the only obligee named therein, and there is no express provision that such parties shall have any rights thereunder*, is affirmed by the great weight of authority." (Italics supplied.)
>
> Annotation at 77 A. *L. R.* 83-89.

The effect of the distinction between intention of parties to a bond to confer substantive rights on a third party and intention to give a remedy for enforcement of those rights is thus noted in an annotation at 77 A. *L. R.* 29-30:

> "Yet it may be doubted that the intention of the parties as to whether the laborer or materialman should have a right to sue on the instrument will be controlling on the courts. *The intention of the parties controls in the creation of a right under the bond; but once the*

right is created, the law furnishes the remedy irrespective of the intention of the parties." (Italics supplied.)

For other authorities on the right of a private person to sue on a bond running to a governmental agency, see Subdivision III (b) of this brief, on the point that such persons are not deprived of beneficial interest in an official bond merely because the only obligee named is a public agency.

Surety's Authorities Discussed.

The authorities hereinafter cited have been cited by the surety and the courts below as disproving our right to sue. We respectfully submit that these authorities are either distinguishable on the ground that different fact situations were involved, or are not controlling in the face of *Howard vs. United States*, 184 U. S. 676, and the other cases we have cited above.

From *Idaho Gold Reduction Co. vs. Croghan* 6 Ida. 471, Judge Nordbye, the trial judge, quoted:

> "We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

Obviously, the Idaho Court, in its short opinion which shows that it did not give to the case the thorough consideration that this Court gave to the *Howard Case, supra*, overlooked thereby the point that authority of a third party to sue on a federal official's bond may be found in *legal intendment* of the statute that requires the bond, as well as in a statute that explicitly confers the right to sue.

When the *Howard Case* was before this Court, plaintiffs in error cited the *Idaho Gold Reduction Co. Case* as

supporting a contention that an official bond must be deemed to be for the sole benefit of the governmental agency requiring it, in the absence of a statute giving a right of action to individuals (see 46 L. Ed. 754, 2d col.). Having reached a conclusion contrary to that contention, it is perhaps not strange that this Court did not mention the Idaho Case in its opinion. But it is significant that this Court found two other cases cited by petitioners in error on the same point deserving of mention to the extent of distinguishing them from the *Howard Case*. (See 46 L. Ed. 761, 1st col.)

That a postmaster is under legal duty to users of the mails was recognized by the Idaho Supreme Court in the last cited case, where the Court said:

> "That the postmaster is liable to a private person for money or property lost through the negligence or wrongful act of the postmaster or his assistants or servants is, we think, established by the authorities; but we have found no case where such recovery was had or sought by action upon the postmaster's bond to the United States. (*Bishop vs. Williamson*, 11 Me. 495; *Bolan vs. Same*, 1 Brev. 181; *Coleman vs. Frazier*, 4 Rich. 146, 53 Am. Dec. 727; *Christy vs. Smith*, 23 Vt. 663.)"

In the face of this recognition of duty, the Idaho Court's conclusion that a private person cannot recover on a postmaster's bond can be sustained on no other theory than that a bond securing the performance of *all* of a postmaster's duties does not mean all of his duties, but only those due the United States, where the bond is payable to the United States only.

It will be noted that the Idaho Court excludes from consideration any question of legal intendment, excepting the fact that the obligee named in the bond is the United States.

By stressing the point that there was no statute expressly permitting a private party to sue on the bond, as in the case of a marshal's bond, the Court ignored all considerations of legal intendment that were applied by this Court in the *Howard Case*.

Furthermore, the opinion of the Idaho Court indicates that the decisive factor in the case before it was the following:

> "It does not appear from the complaint, otherwise than by the reference to the Revised Statutes of the United States, to whom the bond was given, or what were the conditions thereof. * * *
>
> "That an action can be brought upon the official bond of a postmaster by a private party alleged to be injured by the wrongful conversion, by the postmaster, of moneys belonging to such private person, and that without setting forth or producing the bond, or a copy of it, in the record, is a proposition of which we can find no authority."

Judge Nordbye, also, cited (R. 83) *Wile vs. United States Fidelity & Guaranty Co.*, 6 Alaska 48, where it was held that a postmaster who paid a loss to the Government, caused by his deputy's embezzlement, was not entitled to sue on the deputy's bond for reimbursement, and where the Court said that the bond ran to the United States and was, by "its terms to protect the government." But that that decision is not in point here is shown by the reference we have already made to the decision in *Massachusetts Bonding & Ins. Co. vs. United States* (C. C. A. 7), 54 Fed. (2d) 1039. In the latter case, the Court also ruled that no recovery could be had on a deputy postmaster's bond given to the United States, for the benefit of the postmaster who had made good the deputy's shortage. But at the same time the Court distinguished between the right of recovery in such a case and the right of a

user of the mails to recover on such a bond.

It is obvious that the learned District Judge in Alaska who decided the *Wile Case*, *supra*, like the Supreme Court of Idaho, laid undue emphasis upon the facts that the bond in question named the United States as obligee and that there was no statute expressly giving a remedy to private parties on the bond. He rested his opinion solely, so far as precedents were concerned, on the Idaho Case and *United States vs. Griswold*, 8 Ariz. 453, 76 Pac. 596.

But the *Wile Case* does stress one thing that distinguishes it from the case at bar, and that is that, in that case, the postmaster could have protected himself against his assistant's default by taking a bond to himself. No kindred protection could have been secured by plaintiff in the case at bar.

Strangely enough, *Washington vs. Young*, 10 Wheat. 406, 6 L. Ed. 352, is relied upon both by the surety and by the lower courts as supporting their decisions; and by us as showing error in those decisions.

We take the position that the *Washington Case*, *supra*, is important in that it established the right of a private person to sue on a public bond by *legal intendment* of a statute not *expressly* conferring the right. The case takes on much greater importance, because this Court in *Howard vs. United States*, 184 U. S. 676, adopted the same doctrine. But we deny that the holding in the *Washington Case*—that a bond given to a municipal corporation by its lottery manager to execute his duties did not by legal intendment give a right to a ticket holder to recover on the bond the amount of a prize won by the ticket—helps solve the question here presented: Does the postmaster's bond statute, by legal intendment, give mail-users a right to sue?

The lower courts and the surety have stressed this Court's approval, in the *Howard Case*, of the holding in the *Washington Case*, that "generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent." But the learned trial judge overlooked the more important point that this Court, in the *Howard Case*, recognized and applied a qualification of the general rule laid down in the *Washington Case*, saying:

> "But it"—the decision in the *Washington Case*—"also sustains the proposition that consent may, under some circumstances, be assumed to have been given; that is, may arise by legal intendment."

Then this Court, in the *Howard Case*, proceeded to distinguish that case from the *Washington Case*. And what was said on that point (184 U. S. 691-692) is sufficient to distinguish the case at bar from the *Washington Case*. This Court said that the corporation of Washington was authorized to establish lotteries or a "temporary and local" object—to make public improvements. "It is not unreasonable to suppose that in taking such a bond the corporation had in mind to protect itself in making the public improvement." But, on the other hand, the federal courts were established so that "jurisdiction might be invoked by all entitled to do so, and the requirement that the clerk should execute a bond for the faithful discharge of his duties and for the seasonable recording of the judgments, decrees, and determinations of the Court—no distinction being made between public and private suitors—was an assurance to all suitors that, within the limit of the penalty of any bond taken from him by the Government, their rights could be protected

against any act or omission on his part resulting to their injury."

The same reasoning requires that the case at bar be distinguished from the *Washington Case*. Post offices were established not only for both private and governmental use, but principally for use in private affairs. The requirement that the postmaster should execute a bond for the faithful discharge of his duties under the postal laws and regulations—no distinction being made between duties to senders and addressees of private mail, and duties to the Government as the Government's agent in serving the public—"was an assurance to all" users of the mails "that, within the limits of the penalty of any bond taken from him by the Government, their rights would be protected against any act or omission on his part resulting to their injury."

Fosmire vs. National Surety Co., 229 N. Y. 44, 127 N. E. 472, is, also, cited against us. There the Court did not hold that express statutory authority is essential to enable a private party to sue on a public bond. In fact, the contrary was plainly intimated in the extract from Mr. Justice Cardozo's opinion quoted below. The single holding in the case was that a state highway contractor's bond to faithfully perform the work, to pay wages of laborers, etc., was so worded as to negative legislative intention that the bond should inure to the benefit of the contractor's employees. The opinion says:

> "We think the cause of action is in favor of the people"—the State—"solely. * * * In so holding, we put our decision upon the single ground that *the bond, read in its entirety, is inconsistent with an intention that the plaintiff and others in like position should have the right to sue upon it.* If the intention is absent, the right to sue will be denied. * * * For the pur-

pose of this opinion, we assume, without attempting to decide, that when such an intention is revealed, there is no legal obstacle in the way of its enforcement." (Italics supplied.)

In the last cited case, there was no claim that plaintiff could not sue, merely because there was no statute expressly authorizing him to sue. The decisive question there was, as in the case at bar, whether the statute requiring a bond negatived intention to benefit third parties. The bonds in the two cases are so differently worded and cover such dissimilar subject-matter as to make the holding in the New York case of no weight here, excepting that it is in line with *Howard vs. United States*, 184 U. S. 676, on the point that third parties can sue on a public bond when it shows an intention that they shall be protected by it.

Any reliance that the Surety Company in the case at bar may make on the New York case must overlook this difference in situations involved: A postmaster, like the federal court clerk in the *Howard Case*, undertakes the performance of duties both to the Government and to users of the mail —principally to the users of the mails, the duties to the Government being those largely arising as an incident to serving the public. On the other hand, a highway contractor's undertaking is merely to do work in accordance with plans and specifications. Laborers are free to refuse to work for him on a state highway job, unless satisfactorily assured that they will receive their pay. The contract to build the highway is not for their benefit. But post offices exist primarily for the benefit of private users of the postal service, who have no means of protecting themselves; protection must come, if at all, through the Government's manifestation of intention that they be protected.

The *Fosmire Case, supra*, was discussed and distinguished in *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, 192, in the latter Court's holding that a bond of a carter of imported goods to be "responsible to the United States for all loss, injury, or damage to merchandise" in his custody, was for the benefit of owners of the goods, as well as for the benefit of the United States. The Court, disregarding the *Fosmire Case*, followed the rulings in the *Howard Case*, and other cases on which we rely and which we have hereinbefore discussed, including *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and *United States vs. Ward* (C. C. A. 8), 257 Fed. 373.

Clark vs. United States, 60 Ga. 156, cited by the trial judge (R. 84), merely decided that an internal revenue collector's bond was so worded as to show intent to indemnify the Government alone.

As to remedies on a postmaster's bond: To the statement in *United States vs. Griswold*, 8 Ariz. 453, 457, 76 Pac. 602, that the sender of a registered package through the mails could not sue on such a bond, there are two answers: (1) The statement was dictum, because the only question presented for decision was whether or not the United States could sue on behalf of the sender. (2) The first conclusion reached by the Arizona Court—that a postmaster's bond is broken when he defaults in a duty to a sender of mail—would have necessitated a holding that the sender could have sued on the bond, under the doctrine of *Howard vs. United States*, 184 U. S. 676, had his right to sue been before the Court. The decision that a postmaster's bond was liable for loss resulting from the principal's violation of official duty to users of the mail, and that the Government could sue on the bond on behalf of the injured party, favors our position. The dictum that a user of the mail cannot sue on his

own behalf cannot hurt us, in the face of authorities hereinbefore cited.

IX (a).

Congress Has Prescribed No Special or Exclusive Remedy, for the Benefit of Mail-Users, on a Postmaster's Bond.

(See Assignment of Error No. 5.)

The surety has energetically argued that, even if the postmaster breached his bond to plaintiff's sole and private injury, the surety has some sort of sacred right to be sued by the Government, albeit the Government would of necessity turn the recovery over to plaintiff. But the surety has not yet indicated wherein there is any vitality in the difference between an action brought *by* the United States, in its own name for the use of a mail-user, and an action by the mail-user in the name of the Government for his own use. We concede that if there were a statute prescribing by whom the action should be brought, it would have to be followed, if indicating mandatory intent. But there is no such statute.

It would not be just to the Government or to users of the mail to burden the Government with the litigation of private claims against postmasters, or their sureties, whether based on tort or their bonds. There is no reason why the Government should incur the expense of maintaining suits to enforce payment of damages privately sustained. Nor would it be just that the Government take from private claimants the right to prosecute their claims through their own attorneys. Congress has not expressed a purpose to do any of these things. The Department has no power to do so.

As the Wisconsin Supreme Court said in *State vs. Dahl*, 150 Wis. 479, private beneficiaries of a public official's bond

"must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions, not dependent upon the will of others who have no beneficial interest in the promise."

A suggestion made at page 30 of the surety's reply to the petition for certiorari, that the Department has opportunities superior to those of the courts for determining *whether or not suit should be brought* on a postmaster's bond for the benefit of a mail-user, and whether or not the bond has been broken, is so repressive of the rights of the people as to bear its own refutation. One aggrieved by breach of a postmaster's bond is not to be denied a remedy for the breach at the whim of an administrative officer of the Government.

Whether a bond has been broken is a matter for the Courts to determine, whether an action be brought by the Government, or by a private mail-user, in the name of the Government, to redress a wrong against him.

If, as recognized in *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, a mail-user has a right to maintain a private suit against a postmaster to enjoin misdelivery of mail, to avoid resulting damage, why should he not be permitted to maintain a suit to recover damages resulting from misdelivery, whether the action be for the postmaster's tort or on his bond, unless there is a statute expressly denying the right to maintain a private suit? (We do not digress to discuss the point whether such a statute would be constitutional, unless it should provide statutory machinery under which the Government would be bound to sue for the benefit of the aggrieved mail-user.)

If this Court should find that a postmaster's bond was intended by Congress to protect private mail-users as well as the United States, that would necessarily involve a conclusion in line with that reached in *Howard vs. United*

States, 184 U. S. 676, "therefore no *statute* forbidding it, a private" mail-user "may bring an action thereon for his benefit in the name of the obligee, the United States."

So, to sustain the form in which plaintiff has sued, there remains for consideration only the subsidiary question, is there a *statute forbidding* suit in that form?

Defendants cite no forbidding statute.

In moving to dismiss this action, the surety insisted that *Postal Laws and Regulations, 1932*, Sec. 816, provided "the sole, exclusive and only method of recovery on the bond here involved" (R. 64, 66). In its reply to our petition for certiorari (pp. 12-13, 29-30) substantially the same contention is made.

In the next subdivision of this argument, we discuss the effect of Sec. 816. For present purposes, we dismiss it on the ground that a *departmental regulation* cannot be regarded as *an act of Congress*, within the doctrine of *Howard vs. United States*, 184 U. S. 676, which holds that where an official bond is found to be for the benefit of private persons a legal intendment that a private person may sue on the bond in the name of the United States follows from an omission by *Congress* to prescribe another and exclusive remedy. Specifically, the language of the *Howard Case* is

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, *no statute forbidding it*, a private suitor may bring an action thereon," etc. (184 U. S. 693). (Italics supplied.)

It has not been asserted by either of the Courts below or by either of the defendants that there is any statute that expressly forbids this action, in the form in which it has been brought. But it is attempted—particularly by the surety—

to draw a prohibitory inference from 28 *U. S. C. A.*, Sec. 732. That section is entitled "Suits for duties, imposts, taxes, penalties or forfeitures," and reads:

> "All suits for the * * * enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or * * * vessels, or the internal revenue; or direct taxes, and *all suits arising under the postal laws*, shall be brought *in the name of the United States*." (Italics supplied.)

This is the only statute that is cited against our right to maintain this action, assuming that mail-users are co-beneficiaries with the Government under a postmaster's bond.

As to Sec. 732, our position is as follows:

(1) One reasonable interpretation of the statute, if not the only permissible one, considering the context of the entire section, is that the statute is limited to suits for the recovery of *duties, imposts, taxes, penalties* and *forfeitures*. That is plainly indicated by the catchwords at the head of the section. That is the interpretation that was given to the section in *Williams vs. Wells Fargo & Co. Express* (C. C. A. 8), 177 Fed. 352. There the Court said (pp. 355-356):

> "This is beyond all peradventure a suit to recover a *penalty arising under the postal laws* as provided in section 919 above quoted"—28 *U. S. C. A.*, Sec. 732.

In *United States vs. Hartford Accident & Indemnity Co.* (D. C., Md.), 15 Fed. Supp. 791, 804, the Court held that a suit on a bond, conditioned for compliance with an internal revenue permit concerning alcohol and for the payment of taxes and penalties, was not an action to recover a penalty. There the opinion disagrees with *United States vs. Jolles*, 251 Fed. 417, not on the point that a suit on a bond to recover compensation for a loss is not an action for a penalty, but on

the point that an action on a bond to recover a penalty is an action for a penalty.

An examination of *Brady vs. Daly*, 175 U. S. 148, 154, 155, shows that it fully supports the decision of the Court in the *Jules Case*, on the point that an action to recover compensation for loss sustained through violation of a statutory right is not an action for a penalty.

That it has not been generally regarded that every suit that arises under the postal laws falls within Sec. 732, is shown by numerous cases in which private actions have been brought against postmasters in their official capacity. See, for example, *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, a private suit to enjoin misdelivery of mail, where jurisdiction was upheld on the ground that the suit was one arising under the postal laws.

(2) Sec. 732 does not in express terms require any action covered by it to be brought *by* the United States. It merely declares that actions covered by it shall be "brought in the name of the United States." The action at bar is brought in the name of the United States.

As shown by the catchwords preceding the text of Sec. 732, the statute deals with "Suits for duties, imposts, taxes, penalties, or forfeitures." Does not the context of the entire section manifest a legislative purpose to limit the statute to suits of the nature described in these catchwords?

The surety cites *Williams vs. Wells Fargo & Co. Express* (C. C. A. 8), 177 Fed. 352, as showing that Sec. 732 applies to the case at bar. But that was an action by an informer to recover his *share* of a *statutory penalty*, in which the Government had an equal pecuniary interest. The Court merely decided that under a statute prescribing a penalty for private carriage of mail, and under another statute providing

that penalties recovered for violating any law affecting the Post Office Department or its revenue or property should be divided one-half to the informer and the other half to the Treasury for the benefit of the Department, an informer could not sue in his own name for his share of the penalty. The Court explicitly recognized that where an informer is entitled to one-half of a penalty recoverable by the Government, he would, *by necessary implication*, have a right to sue in his own name and to the use of himself and the Government, in the absence of a statute to the contrary.

At page 29 of its reply to the petition for certiorari, the surety company argues that funds recovered in suits brought under Sec. 732 must first go into the federal treasury to be "by the United States disbursed *in such manner as it determines*." (Italics supplied.)

The surety company relies particularly on what was said in *The Stella B* (D. C., E. D., N. Y.), 183 Fed. 507, 512: "But a general *penalty* provided by a law of Congress and *not particularly specifying that the penalty shall go to somebody else* must carry with it the payment of the penalty into the treasury of the United States." (Italics supplied.) There are at least two answers to a reliance upon that declaration:

(a) An action on an official bond, to recover for a loss sustained through breach of the bond, such as is the action at bar, is not one to recover a *penalty* within the meaning of Sec. 732.

In *United States vs. Jokes* (D. C., Mass.), 251 Fed. 417, the Court thus distinguished an action on a bond to recover a *penalty* and an action on a bond to recover for a *loss* (p. 418):

"It seems to me that the question must depend upon the character of the liability sought to be enforced. If

it is based upon a loss sustained by the plaintiff, and is awarded as compensation for injury done, it is not a forfeiture or penalty, even though the amount awarded may exceed the damages proved." *Brady vs. Daly*, 175 U. S. 148, 154, 155. * * *. On the other hand, if the sum claimed has no relation whatever to any loss sustained by the plaintiff, but is arbitrarily exacted for some act or omission of the defendant, it would be essentially penal. *Wisconsin vs. Pelican Ins. Co.*," 127 U. S. 265, 292, 293.

(b) It is obvious that in the declaration above quoted from *The Stella B*, 183 Fed. 507, 512, the Court had distinctly in mind only cases where Congress had not indicated a purpose that a penalty should go to any one other than the Government. It excluded cases where Congress has specified that the penalty shall go to someone else. True, the Court refers to a *particular specification* by Congress. But would not the opinion be unsound if interpreted as intimating a vital distinction between an intention of Congress particularly specified, and an intention of Congress arising from necessary implication? There are sound reasons why a penalty or other recovery should go into the federal treasury where there is no Congressional hint as to who shall be beneficiaries of the fund. On the other hand, it would be useless, if not senseless, to require that a recovery, in which the Government could have no pecuniary interest, pass through the federal treasury when it necessarily would be payable to a private beneficiary indicated by an act of Congress, whether the indication be express or implied.

The surety company's insistence that a recovery of plaintiff's private loss should pass into the hands of the Government to be "disbursed in such manner as it determines" is amazing.

In *Regina vs. McPherson*, 13 U. C. C. P. 17, the Canadian Court of Common Pleas held that, although the Canadian Post Office Act authorized the Postmaster General to sue on a postmaster's bond in his official name, the Crown still retained its right to bring sci. fa. against the bondsmen.

Thus it will be seen that this action was brought in proper form whether or not it is an action covered by 28 *U. S. C.* A. Sec. 732. If that section does not apply, then there is no statute forbidding suit in the name of the United States by an aggrieved beneficiary of a postmaster's bond. If the section does apply, it makes no further requirement than that the action be brought *in the name of the United States*, without expressly or impliedly requiring the action to be brought *by* the United States when it has no pecuniary interest in the subject-matter.

That Some Statutes Requiring Bonds of Other Federal Officials Expressly Confer a Remedial Right on Private Persons Does Not Negative Congressional Will or Intent to Confer Such Right on Mail-Users.

Overlooking the doctrine of *Howard vs. United States*, 184 U. S. 676, which accords a right of action to all beneficiaries of an official bond, *where Congress has not forbidden that remedy*, Judge Nordbye, the trial judge, suggested that there is significance in the fact that there is *no statute expressly permitting private parties to sue* on postmasters' bonds, whereas there is such provision in the case of marshals', consular officers' and public contractors' bonds (R. 87).

The same suggestion was made in the *Howard Case* and was there rejected, this Court saying:

> "We are of the opinion that this argument, although not without force, ought not to prevail against the legal

intendment of the statutory provisions relating to clerks, who hold a peculiar relation to the courts appointing them, as well as to the public" (184 U. S. 694).

In Subd. VII (c) of this brief and other subdivisions of our argument hereinbefore presented, we have attempted to demonstrate that postmasters stand in much closer and more important relationship to mail-users than Federal Court clerks do to private litigants.

Lammon vs. Feusier, 111 U. S. 17, was an action on a United States marshal's bond, given for faithful performance of his duties (see 28 *U. S. C. A.*, Sec. 496). This Court decided that a marshal was personally liable for wrongful levy and added:

> "But the remedy of a person, whose property is wrongfully taken by the marshal in officially executing his writ, is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the Government, *for the indemnity of all persons injured by the official misconduct of himself*," etc. (Italics supplied.)

It will be noted that Sec. 496 does not specify who shall be beneficiaries of the bond. Therefore, so far as *substantive rights* are concerned, there is as good reason for holding that a postmaster's bond, under 39 *U. S. C. A.*, Sec. 34, is as much for private benefit as is a marshal's bond, because each is conditioned for the faithful performance of official duty.

It is true that, as to marshals' bonds, there is a *separate* statute that specially provides that, "in case of a breach of the condition of a marshal's bond, any person thereby injured may institute *in his own name and for his sole benefit* a suit on said bond," etc. (28 *U. S. C. A.*, Sec. 500). In the *Lam-*

mon Case, this Court gave effect to that statute by adding to what we have above quoted from the opinion: "and his bond may be put in suit by and for the benefit of any such person."

As we read 28 *U. S. C. A.*, Secs. 496, 500, as applied by this Court in the cited case, Sec. 500 deals only with *remedial* rights. A *substantive* right in private persons rises from the language in Sec. 496, "faithful performance of duties." When Sec. 500 specifies a special *remedy* for enforcement of the right, it does not enlarge the natural meaning of the last quoted words.

Howard vs. United States, 184 U. S. 676, was decided 18 years after the *Lammon Case*, and the absence, as in the case at bar, of any special statute specifying any remedy in favor of a private person was not held to preclude a remedy. This Court said:

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, *no statute forbidding it*, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States."

Whatsoever may be the effect of the decision in the *Lammon Case*, the point remains that the case at bar is squarely within every principle recognized in the *Howard Case*, including principles applicable to remedy as well as substantive right. We have referred to the *Lammon Case*, partly because of an allusion made to it in the *Howard Case* and partly because the trial judge in the case at bar attached importance to the fact that there is a statute prescribing a remedy on a marshal's bond (R. 87).

Any argument that because Congress has specified that private beneficiaries may sue on bonds of marshals, con

sular officers, and contractors, [redacted] private beneficiaries may not sue on the bond of a court clerk, or postmaster, merely because Congress has omitted to specify a remedy, falls well within the spirit of what this Court said in *Keifer & Keifer vs. Reconstruction Finance Corp.* (Feb. 27, 1939), 83 L. Ed. 512, 515. It will be remembered that in the cited case the Court found that the Regional Agricultural Credit Corporation was subject to suit, although there was no statute expressly authorizing it to be sued. After observing that Congress may create corporations to execute governmental powers, the Court said:

> "But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, *such a clause is not a ritualistic formula which alone can engender liability* like unto indispensable words of early common law, such as 'warrantizo' or 'to A and his heirs,' for which there were no substitutes and without which desired legal consequences could not be wrought.
>
> * * *
>
> "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?" (Italics supplied.)

This Court's statement that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work," fully answers any attempt that may be made by the surety in the case at bar to usurp the postmaster's official position as armor.

IX (b).

No Departmental Regulation Purports to, or Could, Prescribe an Exclusive Remedy on a Postmaster's Bond.

Although defendants have persistently confused the question of substantive right to benefit under a bond, with the question as to what sort of remedy is available when the substantive right has been established, we glean from their replies to the petition for certiorari, as well as from their briefs in the lower court, that they rely on *Postal Regulations*, Sec. 816, and 28 *U. S. C. A.*, Sec. 732, as denying the plaintiff's right to maintain the action in the name of the Government.

In the preceding subdivision, we have discussed the effect of the statute, Sec. 732.

As to the regulation, Sec. 816, there are, of course, several obvious answers:

(1) Even if a department regulation purported to forbid a private mail-user from suing in his own name, the regulation could not be regarded as a "statute" forbidding suit in that form, within the meaning of what this Court said in *Howard vs. United States*, 184 U. S. 676.

Sec. 816, having been adopted by a mere administrative department of the Government, could not limit a right to sue given by Congress, through legal intendment, any more than it could limit a right to sue given by express statutory provision. No department of the Government has power to adopt a regulation inconsistent with an act of Congress, and no delegation of legislative power to a department arises from the power given to adopt regulations.

The power of the Postmaster General to adopt regulations is limited by 5 *U. S. C. A.*, Sec. 22:

"The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business," etc. (Italics supplied.)

The effect of this statute has been thus limited:

"Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation."

Butler vs. White (C. C., W. Va.), 83 Fed. 578 (reversed on other grounds, *White vs. Butler*, 171 U. S. 379).

If there be any regulation of the Post Office Department that purports to limit either the substantive or the remedial right of a mail-user under a postmaster's bond it must fall under the principle involved in *Morrill vs. Jones*, 106 U. S. 466. There the Secretary of Treasury had attempted by regulation to restrict application of a statute governing admission, free of duty, of breeding animals, by limiting its operation to animals of "superior stock." This Court said:

"In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

(2) Sec. 816 does not authorize actions on postal bonds. It merely provides for departmental demands against postal *employees* and postal contractors for losses arising in certain cases, and for suits by the United States to directly recover for the losses where such demands are not met.

(3) If the regulation could be stretched into *authorizing* a suit on a postmaster's bond to recover for a breach affecting only a user of the mail, there would still be nothing in it

to indicate that this was intended to be an *exclusive* remedy on the bond. Subd. 6 of the regulation provides for a determination by the Solicitor of the Department as to "the *advisability* of suit by the United States." After receiving the Solicitor's reply, the Chief Inspector shall, "*if he deem proper*, prepare the *request* of the Postmaster General upon the Solicitor of the Treasury for suit."

(4) By providing for payment of recovery on claims "to the United States *and* to senders or owners of the mail as their interests shall appear," the regulation clearly shows that it was intended to apply only to cases where there was a joint loss and not to a case like this where the Government sustained no loss. Sec. 816 (7).

In *Griffith vs. W. S. Vick Grocery Co.* (C. C. A. 6), 272 Fed. 246, the company sued a postmaster to enjoin misdelivery of mail to another company. Obviously, the suit involved the same general principles that govern a claim for damages resulting from an accomplished misdelivery. Commenting upon the fact that the acting solicitor of the Department had given instructions concerning delivery of the particular mail, but had directed that the postmaster "comply with any instructions that may be issued by the court with respect to the delivery of this mail," the Court said:

> "This advice was probably given in view of the fact that *a court would be in better position to hear the evidence and determine the respective rights of the parties*, and particularly the changed conditions that might arise in the course of time. Under these circumstances, it was perhaps proper, and undoubtedly to the advantage of all parties concerned, including the Post Office Department, that this action should have been filed in court, where the witnesses could be examined under oath, and the conditions then obtaining be determined with greater

accuracy than would be possible for the Post Office Department upon the mere conflicting statements of rival claimants."

The additional statement in the opinion in the last cited case, to the effect that, under ordinary circumstances, the question as to who was entitled to delivery of mail would be left to the *discretion* of the Department, cannot be applied to a case like the one at bar, where a mail-user has sustained loss through a postmaster's clear violation of postal laws and regulations. If a postmaster's bond covers mail-users, and the bond is violated, there is no room for the exercise of discretion on the part of the Department.

X.

The Attorney General's Refusal to Approve the Bringing of This Suit Does Not Defeat the Right to Sue, Because, as He Ruled, No Interest of the Government was Involved.

At page 15 of its brief in reply to our petition for certiorari, the surety company states that the Attorney General "caused to be filed a brief *amicus curiæ* adverse to petitioner" (R. 53, 54). This reference to the Record is to a statement made by the trial judge:

> "The only indication that the Court has received as to the Government's position in the matter is a brief filed during the trial by the United States Attorney of this district as *amicus curiæ* in support of the defendant surety company's position that the *plaintiff has no right to bring this action on this bond.*"

The brief referred to did not challenge the plaintiff's *right to sue* on the bond, as distinguished from *right to benefits* under the bond. The brief was limited to an attempt to show

that the coverage of the bond was intended to be limited to "fiscal and fiduciary relations * * * between the postmaster and the United States." After citing statutory provisions that are also cited in Judge Nordbye's opinion, the brief argues:

> "It would seem plain from this situation and from the various provisions relating to the liability of the postmaster and his sureties under the bond, that the bond was intended solely to protect the government in respect of the postmaster's responsibility to it and did not contemplate any liability to the public."

As to the surety's assertion that neither the Post Office Department nor the Attorney General ever dreamed that a private mail user could sue on a postmaster's bond, we question the right of the surety to speak for either the Department or the Attorney General, and the existence of anything in the Record that supports the assertion.

Recognition of the right of an individual to sue on a postmaster's bond can be of no practical concern to the Government, if it be assumed that Congress intended that the bond cover individual losses, as well as losses of the Government. This is specially true where, as here, the Government asserts no claim against the bond.

Neither the Postmaster General nor the Attorney General has sought to be made a party to this action. In fact, the Attorney General expressly declined to become a party. In response to a letter written to that official by plaintiff's attorneys (R. 59-60), he stated:

> "*This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest*, but as stated by you, *the claim is the exclusive property of your client.* The bond of the Act-

ing Postmaster was executed in accordance with the provisions of *R. S.* 3834, as amended, *U. S. C.*, Title 39, Section 34. *Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.*

"In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59). (Italics supplied.)

Thus the case falls perfectly within what the Wisconsin Supreme Court said in *State vs. Dahl*, 150 Wis. 479, cited in Subd. IX, *supra:*

"* * * Where, as here, the Attorney General has refused, as he doubtless properly may, to bring the action, because the state has no beneficial interest in it, there seems no good reason which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested."

XI.

The Case Falls Within the General Rule That the Beneficiary of a Contract Has a Right to Sue to Enforce Payment of the Benefit.

Until now we have mainly limited our argument to the legal effect of official bonds—not upon an assumption that such bonds constitute a species unrelated to contracts in general, but because the decisions of this and other Courts in official bond cases settle the law of this case.

However, in view of the effort made by the surety to limit the effect of *Howard vs. United States*, 184 U. S. 676, and other authorities relied on by us, we deem it appropriate to

draw attention to the analogy between the right of a third party to sue on an official bond and the right of third parties to sue on contracts in general.

We concede that *Robins Dry Dock & Repair Co. vs. Flint*, 275 U. S. 303, cited by Judge Nordbye, the trial judge (R. 84), is conclusive on the point that a third party to a contract must show a benefit under the contract before he can sue on it. But the converse is also necessarily true, and if we have shown that postmasters' bonds were required by Congress for the benefit of users of the mail, as well as the Government, then we have a right to sue.

The mere facts that this action is brought on a postmaster's bond, and that the nominal obligee, so far as concerns this controversy, is the Government, cannot require that the subject be classified as belonging to a rare legal species that bears no relationship to the law that governs contracts in general. The bond otherwise falls within the well-established American rule that "where a person makes a *promise* to another for the benefit of a third person," the third person may sue on the promise, subject to certain qualifications. (See 13 *C. J.* 705-711, Secs. 815-817.)

That the Government is the nominal obligee strengthens rather than weakens application of the last stated rule to the case at bar, because the Government exists only "for the people."

Ohio Casualty Co. vs. Beckwith (C. C. A. 5), 74 Fed. (2d) 75, 78, recognized that the right of a third person to sue on policy indemnifying insured against liability for negligent operation of an automobile, fell within the rule applicable to contracts in general. The Court said:

> "If appellant had agreed to pay a debt which the assured owed to appellee, the latter would have had

a clear right to enforce the contract. *There is no difference in principle in the obligation assumed by the policy.*" (Italics supplied.)

In an extensive note commencing at 81 *A. L. R.* 1271, under the head, "Right of third person to enforce contract between others for his benefit," application of the general principle involved is shown to have been made in cases involving a bailor's right to sue on a policy issued to a bailee and upon various classes of bonds, as well as in many cases involving other classes of contracts (pp. 1296-1299).

The case at bar is not to be regarded in any sense as *sui generis* until and unless it appears that it does not fall well within well-established general principles.

In an action on bonds for faithful performance of official duties, the Ohio Supreme Court said in *American Guaranty Co. vs. McNicce*, 111 Ohio St. 532:

> "We have no patience with any theory which would permit each separate case of a class which may be determined by the same general principles to become *sui generis*, for the reason that the doctrine of *sui generis* tends to supplant the fundamental principle that rights and liabilities are such by law, rather than by the conscience of the particular tribunal which may be called upon to determine them."

CONCLUSION

The foregoing argument is relied upon as demonstrating:

1. That Congress intended that private mail-users should be co-beneficiaries with the Government in the protection afforded by postmasters' bonds.

2. That there is no statute forbidding the bringing of the suit in the form in which it has been brought, and that, therefore, the remedy pursued is within the intendment of Congress.

As a resumé of our argument, we adopt, and respectfully refer the Court to, the points stated in the Index, under the head of "Argument."

To accord to mail-users the benefit of a postmaster's bond for the faithful performance of *all* of his duties is consonant with both the spirit and the letter of the statute which requires the bond.

In this connection, we draw attention to the decision of this Court in *Postmaster-General vs. Early* (1827), 12 Wheat. 136, an action on a postmaster's bond. There, Mr. Daniel Webster and co-counsel argued that a bond given for faithful performance of the postmaster's duties and for accounting to the Government was void, because, when the bond was given, there was no statute authorizing the taking of a bond for faithful performance of duties other than to account to the Government. As showing that this Court regarded a condition of a bond for faithful performance of a postmaster's duties as covering *official conduct in general*, we quote from the opinion of Chief Justice Marshall in that case:

> "Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for

the payment of money of the United States, which might come to the hands of the deputy-postmaster. *That part of the condition* which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by *that part* of it which shows that it was *also* taken to secure the *general official conduct* of the deputy" (p. 149). (Italics supplied.)

Assuming that a private mail-user is a beneficiary under a postmaster's bond, every possible intendment favoring his right to sue in the name of the United States, with personal control over the litigation should be indulged, where, as here, the Government asserts no claim against the bond. This should be so, first, because it would be unfair to the Government to burden its legal officers with the enforcement of private rights, and to burden its treasury with the expense of what is in reality private litigation. It is so, second, because it would be oppressive to deny to the individual the right to control the prosecution of his own private claims.

The judgment of the Circuit Court of Appeals should be reversed, and the cause should be remanded for further proceedings to be had in accordance with the verdict returned by the jury in the District Court.

Respectfully submitted,

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